

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :
 : 04-CR-1016 (NGG)
 :
 versus : United States Courthouse
 : 225 Cadman Plaza East
 : Brooklyn, N.Y. 11201

RONELL WILSON, :
 :
 : DECEMBER 3, 2012
 DEFENDANT. : 9:00 A.M.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
UNITED STATES DISTRICT COURT JUDGE

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17 Proceedings recorded by mechanical stenography, transcription
18 by computer-aided transcription.
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Proceedings

1 (In open court.)

2 (Defendant present in open court.)

3 COURTROOM DEPUTY: All rise. The United States
4 District Court for the Eastern District of New York is now in
5 session. The Honorable NICHOLAS G. GARAUFIS is now presiding.

6 (Honorable NICHOLAS G. GARAUFIS takes the bench.)

7 COURTROOM DEPUTY: Calling CRIMINAL CAUSE FOR
8 HEARING in Docket No. 04-CR-1016, United States of America
9 against Ronell Wilson.

10 Counsel, please note your appearances for the
11 record.

12 MR. McGOVERN: For the United States of America,
13 Assistant United States Attorney Celia Cohen and James
14 McGovern. With us is Special Agent Keltar Mui.

15 Good morning, Your Honor.

16 MR. BURT: Michael Burt, Colleen Quinn Brady and
17 David Stern for the defendant. With us is Mayerlin Ulerio, a
18 paralegal from our office.

19 THE COURT: Good morning. Be seated, please.

20 The witness may take the stand. Are you ready, Ms.
21 Cohen?

22 MS. COHEN: Yes, your Honor.

23 THE COURT: Just first of all, I'm very sorry about
24 the little interlude on Saturday afternoon. It was something
25 I could not avoid. But I'm sure that you managed to fill the

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1 time with productive activities.

2 I remind the witness that she is still under oath.

3 Ms. Cohen, you may continue your cross-examination.

4 MS. COHEN: Thank you, Your Honor.

5 I just want to hand up -- on Saturday, we had talked
6 about Government Exhibit 99, that counsel and I were going to
7 review it for some corrections.

8 THE COURT: Right.

9 MS. COHEN: We have now agreed on a correct version.
10 Even though the other one was only put in as an exhibit
11 subject to review, we've just -- to make it clear, we've
12 marked it as Government Exhibit 99A so we know this is the
13 corrected version.

14 THE COURT: Okay. I'm going to keep 99 in the
15 record so that the record is complete.

16 MS. COHEN: Perfect.

17 And then the other thing I'm just handing up to the
18 Court is a smaller version, which I've also given to
19 counsel -- I just misplaced them on Saturday -- of Government
20 Exhibit 99.

21 THE COURT: Very well. Any objection to 99A?

22 MR. BURT: No, Your Honor.

23 THE COURT: 99A is received in evidence without
24 objection.

25 (Government Exhibit 99A received in evidence.)

Proceedings

1 MS. COHEN: And as far as Government Exhibit 98, I
2 have informed counsel, just for the record, where those
3 numbers came from, and they are from -- and this is, again,
4 Government Exhibit 98, the psychometric conversion chart. I
5 informed counsel during the break that it came from the
6 WAIS-IV manual. And so obviously they can do with it
7 whatever, but that's just the basis for the chart. And again,
8 we can have one of our experts testify for it, but the numbers
9 came directly out of the WAIS-IV manual.

10 THE COURT: All right.

11 CONTINUED CROSS-EXAMINATION

12 BY MS. COHEN:

13 Q Good morning, Dr. James.

14 A Good morning.

15 Q When we left off on Saturday, we were talking about the
16 Popp score from the year 2000.

17 A Yes.

18 Q And in the Popp score, we were talking about the wording
19 of the actual report. And just to get back to where we were,
20 we talked about the fact that Psychologist Popp was concerned
21 about short-term memory weakness and gave an extra test. Do
22 you recall that discussion?

23 A Yes, I do.

24 Q And we agreed that, in fact, the extra test produced a
25 high average score. Do you recall that?

James - Cross/Cohen

1 A Could you tell me what the name of the extra test was?

2 Q Sure. In the report on GOV 004023.

3 A Yes.

4 Q This is in the third full paragraph. And the third full
5 paragraph just says: "To explore the possibility of a

6 short-term memory weakness, another subtest was completed."

7 And if you look up at the top, it appears that there's a

8 letter/number sequencing test that was given.

9 A Yes, that's correct.

10 Q And that would be a short-term memory weakness subtest?

11 A Yes. It's a subtest that looks at short-term memory.

12 Q And that score, 14, would be in the high average,
13 correct?

14 A Yes. And it stands out -- I do have concerns about that
15 score, only because it stands out in contrast to the rest of
16 the record of that assessment. He has an arithmetic score of
17 five, and arithmetic involves calculations, math calculations,
18 which is actually a more difficult test than the letter/number
19 sequencing.

20 Q Okay. Well, what we're looking at is what he's written
21 here.

22 A Right.

23 Q And you have no reason to doubt that what he wrote was
24 incorrect, right?

25 A Well, I do question that letter/number sequencing, the

James - Cross/Cohen

1 validity of that score, only because it's nine scale score
2 points higher than the arithmetic score, which is a more
3 difficult subtest.

4 Q You didn't speak to Psychologist Popp about this,
5 correct?

6 A No. But when we look at results like this and we look at
7 scores that are very high or very low in comparison to the
8 rest of the protocol, that stands out as very high.

9 Q But the point here is that Popp made an extra effort to
10 give a subtest regarding short-term memory, correct?

11 A I think he -- yeah. I mean, he gave another test. And
12 the letter number sequencing isn't part of the core. So he
13 gave another test to take a look at short-term memory.

14 Q Okay.

15 My question is: He gave another test because he
16 seemed to be concerned about the short-term memory weakness,
17 right?

18 A Yes. Yes.

19 Q Now, he also gave the Bender Visual-Motor Gestalt test,
20 correct?

21 A That's correct.

22 Q And that test is not typically a test for mental
23 retardation, correct?

24 A That's not a test that would be typical, no.

25 Q Right.

James - Cross/Cohen

1 However, if you turn to the -- well, at the
2 beginning of that page, the last sentence is: "Ronell's
3 work," moving on to the next page, "was organized, neat and
4 done with seeming confidence and planning."

5 Now, putting aside what this tests, obviously those
6 comments are inconsistent with somebody with mental
7 retardation, correct?

8 A I wouldn't say it's inconsistent, because the Bender is a
9 very, very old test from the 1920s, and it's essentially a
10 drawing test. The figures that are -- and he's been given
11 that test -- he had actually at that point had been given that
12 test multiple times. It's a very simple test of drawing
13 figures. It's not very difficult at all.

14 Q Okay.

15 But the comment that he was organized, neat and had
16 done with seeming confidence and planning, while, again, that
17 doesn't test someone for mental retardation, those comments in
18 and of themselves are something that is inconsistent with
19 someone with mental retardation?

20 A I wouldn't say it's inconsistent, no. I mean, the fact
21 that he showed confidence is not inconsistent with mental
22 retardation. People with mental retardation can be confident.
23 And people with mental retardation can plan, if it's a very
24 simple planning task. And the Bender is a very, very simple
25 drawing test.

James - Cross/Cohen

1 Q You've testified that part of intelligence, intelligent
2 tasks in organization, planning, those are qualities that tap
3 into intelligence, correct?

4 A That is correct. That is part of the definition of
5 intelligence.

6 Q Okay.

7 So just to recap, and we'll move onto another test.
8 You didn't speak with Psychologist Popp, correct?

9 A No, I did not.

10 Q His test or his notes indicate that he took careful --
11 that he was careful when he gave this test, that he used his
12 clinical judgment, correct?

13 A That Dr. Popp was careful?

14 Q Yes.

15 A Can you show me where Dr. Popp said he was careful?

16 Q That he took the time to write this report, correct?

17 A Yes. Dr. Popp took the time to write the report, yes.

18 Q That he was detailed in his views on Mr. Wilson, correct?

19 A Well, actually, this is an interesting report, because
20 even though he may have been careful in writing the report,
21 the report doesn't seem to reflect any of the previous testing
22 that Mr. Wilson had had. There isn't anything in the
23 background that is reflective of the many times he had been
24 tested since. Normally, when you write a report, you include
25 in that background section information about previous

James - Cross/Cohen

1 evaluations. I don't see anything there. I also don't see
2 anything about the testing that Mr. Wilson had had two days
3 earlier, educational testing that put his academic skills at
4 the elementary school level.

5 The information that he has on which he's basing his
6 conclusions in this report is actually from Mr. Wilson
7 himself. As you see, it says that Mr. Wilson said that after
8 high school, he'd like to attend college. And this is
9 someone's whose academic skills had always been in the
10 second-to-fifth-grade level.

11 Q Okay.

12 Now, of course, there's a separate report on that
13 other testing that was done, correct?

14 A Yes. It was done two days earlier.

15 Q All right. And Dr. Popp was giving this test, giving an
16 IQ test and writing a report on it, correct?

17 A That's correct.

18 Q And Dr. Popp provided information about his views on the
19 test, right? You talked about the clearly average outcomes
20 for certain tasks, correct?

21 A That's correct.

22 Q He explored a weakness that he saw to make sure that that
23 wasn't an issue, correct?

24 A That's correct.

25 Q He talked about emotional and social factors that were at

James - Cross/Cohen

1 play here, correct?

2 A That is correct.

3 Q And he offered comments on the educational implications,
4 correct?

5 A He did. Although, again, I would be very concerned about
6 taking a look at this report and relying upon it, only because
7 one of the educational implications he says is that Mr. Wilson
8 has a potential to function in the mainstream, and this is
9 someone's that's been in special education since the second
10 grade and has elementary-level achievement.

11 Again, I have concerns about the report because the
12 report doesn't mention any of the earlier testing that was
13 done. And that's a glaring error because his basis for some
14 of this information is Mr. Wilson himself.

15 Q Okay.

16 So you have concerns about this report, but you
17 didn't bother to interview Dr. Popp to ask him those
18 questions, correct?

19 A Well, I didn't need to given that this information is
20 clearly showing that there are holes, there are missing
21 pieces.

22 Q Okay.

23 And for that reason, you're going to toss out
24 Dr. Popp's report as well or Dr. Popp's scores as well,
25 correct?

James - Cross/Cohen

1 A Well, I don't know about tossing out scores. I never
2 talked about tossing out scores. I think that I have concerns
3 about this report which would cause me to place less weight on
4 it given the reasons I mentioned. He's talking about -- it's
5 almost as if he's talking about a different person because
6 he's talking functioning in the mainstream for someone who
7 never functioned in the mainstream.

8 Q Mr. Wilson's scores on this test were much higher,
9 correct?

10 A He has a lot of variability in his scores in this test,
11 in this particular IQ administration. You see his vocabulary
12 is a four, his arithmetic is a five. Digit spanning
13 information are both sixes. Digit symbol coding is a five.
14 He has a number of variable scores.

15 Q He also has a performance scale of 92, correct?

16 A That is correct.

17 Q And that is in the average range, correct?

18 A Is correct.

19 Q And he also had a verbal in this case of 78, right?

20 A That's correct.

21 Q Okay. And that is between borderline and low average,
22 correct?

23 A I'm sorry, the verbal?

24 Q The verbal of 78 is about a low average score, correct?

25 A The verbal of 78 is not a low average.

James - Cross/Cohen

1 Q Between --

2 A It's actually in the borderline range, yes.

3 This is also the administration where he made some
4 substitutions. He actually declined to give picture
5 arrangement and symbol search, as I mentioned earlier.

6 Q All right. Now, symbol search, again, in this case was
7 not a requirement, it was an extra test, correct?

8 A It was a requirement for the full-scale IQ, not for the
9 performance IQ.

10 Q If you look at any of his tests, all across the board,
11 barely anyone gave symbol search, correct? I mean,
12 Dr. Abramson gave it, correct?

13 A They were given when they needed to be given as part of
14 the full-scale IQ.

15 Q Now, by the way, and the other point that you make with
16 respect to the prorating, Dr. Nagler did the same thing,
17 correct?

18 A We don't have the information with which to judge that.
19 We're missing a page of the raw data.

20 Q Okay.

21 But clearly in the prorated chart that we looked at,
22 the fact that she circled the number for that subtest --
23 seven, correct? She circled it on her raw data?

24 A Yes. But I don't know what the circle means. We don't
25 have the piece of paper that would tell us. We're missing

James - Cross/Cohen

1 part of comprehension for that raw data, and we're missing
2 object assembly. So without that information, it's difficult
3 to tell.

4 (Continued on the next page.)
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James - Cross/Cohen

1 Q We're missing that test, correct, the raw data test?

2 A We're missing the raw data for that particular test for
3 object assembly and we're missing part of comprehension.

4 Q For comprehension, she gave a raw data score. Correct?

5 A She gave a raw data score and a scaled score.

6 Q And a scaled score?

7 A Yes.

8 Q For object assembly she did not give a raw data score.
9 Correct?

10 A That's correct.

11 Q And she did not indicate on the other two places in her
12 tests the raw data -- a scaled score for object assembly.
13 Correct?

14 A She indicated scaled scores for object assembly on the
15 face sheet of the protocol.

16 Q Let's go back to this, since now we're -- we're now
17 disagreeing on this.

18 MS. COHEN: Okay. Your Honor, is the Elmo on?

19 Q Dr. James, can you see this on your screen?

20 A Yes, I can.

21 MS. COHEN: I guess --

22 THE COURT: We can get started.

23 MS. COHEN: Okay.

24 THE COURT: It will be up in a moment. Can we
25 identify what we're seeing here?

James - Cross/Cohen

1 MS. COHEN: Sure. This is GOV003942. Again, this
2 is part of Exhibit C-5 in this case.

3 Q Dr. James, looking on to this top area, these numbers
4 represent the scaled scores for each of the subtests.
5 Correct?

6 A That's correct. That's correct.

7 Q And if you will see, you will agree with me, that object
8 assembly has a dash. Correct?

9 A That's correct.

10 Q Here's all the raw data that we looked at last time.
11 It's GOV003946?

12 A Right, that's correct.

13 Q We agree, again, object assembly scale -- raw score is
14 missing. Correct?

15 A That's correct, yes.

16 Q And the scaled score of seven is here. Correct?

17 A That's correct.

18 Q And that scale score is circled?

19 A Yes.

20 Q Correct?

21 A That's right. It's circled in one place and then not in
22 another.

23 Q Okay. It's circled here. Correct?

24 A Right. Yes, that's correct.

25 Q And we also agree that when we looked at the prorating

James - Cross/Cohen

1 table in the back --

2 A Right.

3 Q -- of the WISC-III manual that when you get a score of
4 27, when you add up 9459 --

5 A Right, that's correct.

6 Q -- you look at the table, that equals 34 --

7 A That's correct.

8 Q -- right?

9 We also agree that when you subtract 34 from 27, you
10 get seven --

11 A That's correct.

12 Q -- right?

13 A Yes.

14 Q And Dr. James, you're familiar -- and by the way, in
15 addition, we do not have the page for object assembly?

16 A That's correct.

17 Q And you're familiar --

18 A And we don't have the page for comprehension either, half
19 of comprehension.

20 Q Half of comprehension?

21 A Yes.

22 Q And you're familiar with the term, I would assume,
23 circumstantial evidence?

24 A Yes.

25 Q And you agree that this is good circumstantial evidence

James - Cross/Cohen

1 that Dr. Nagler prorated on this exam. Correct?

2 A There's no way to know. I think that's my bottom line,
3 is that there really is no way to know. We don't have the
4 page that would confirm that. We're missing the raw data that
5 would make that confirmation. So I don't know.

6 Q And Dr. James, you've been practicing since 2003.
7 Correct?

8 A That's correct.

9 Q And in your years of practice, you're familiar with this
10 term "prorating." Correct?

11 A Yes, I am.

12 Q And besides the fact that you can't speak to Dr. Nagler,
13 other than that, you would agree that these records show
14 somebody was prorated. Correct?

15 A Again, I really don't know. I'd have to see the piece of
16 raw data to make that determination for sure.

17 Q Okay. Now, symbol search you mentioned is in a
18 parenthetical. Correct?

19 A That's correct.

20 Q Because that's an extra test. Right?

21 A It's an extra test under the performance scale but it's
22 needed in calculating the full scale.

23 Q Okay. Now -- and by the way, it was not -- the symbol
24 search was not -- eight was not counted in the summary scale
25 scores. Correct?

James - Cross/Cohen

1 A That's correct.

2 Q And you said that you're not -- I said something like,
3 well, so for these reasons, for this reason you're tossing out
4 Dr. Popp's score and you said --

5 A Again --

6 Q -- I'm not tossing anything out?

7 A I'm not tossing out Dr. Popp's score. I have concerns
8 about the report for the reasons I mentioned, for the fact
9 that he didn't mention any previous evaluations. And by this
10 time, Mr. Wilson had had many evaluations. None of those are
11 mentioned, and his recommendations are not in line with the
12 recommendations of any of the previous evaluators.

13 Q And you have no concerns about Dr. Nagler's score.
14 Correct?

15 A I think that there are concerns about Dr. Nagler's score
16 in terms of all of these scores when we're talking about
17 someone who has -- had a Wechsler instrument as many times as
18 he had. At that point it's his fourth Wechsler instrument.
19 We do know that there are practice effects that are in play
20 here.

21 Q My question is --

22 A We were confident -- more confident about her score
23 because we're able to look at the raw data and check it. But
24 any of these scores past that first time that he was given a
25 Wechsler will have some practice effect in play.

James - Cross/Cohen

1 Q You're saying -- so you're -- you're saying now we can
2 rely on these other scores or we can't rely on them?

3 A What I've always said is that it's a matter of relative
4 weight.

5 Q What you said in your report is: "For these reasons" --
6 and I don't know what page of your report this is on because
7 there are no page numbers, but it says -- "the only IQ testing
8 that can be relied upon in this case are tests for which raw
9 data exists."

10 And in the earlier part of your report you have said
11 the only two tests that have raw data are Dr. Nagler and
12 Dr. Drob. Correct?

13 A Dr. Denney also has raw data.

14 Q So you're now also relying on Dr. Denney's score?

15 MR. BURT: Objecting to she's now relying. She said
16 she relied on it in direct examination.

17 THE WITNESS: Yes, I did.

18 Q I mean as compared to your report because at that time
19 you didn't have Dr. Denney's. Correct?

20 A That's correct.

21 Q So you're still relying on Dr. Nagler despite the fact
22 that there's evidence that he didn't try and that there's
23 evidence that she prorated. Correct?

24 A Well, again, I don't know whether or not she prorated
25 since we don't have the raw data to show that. And she does

James - Cross/Cohen

1 indicate that -- I'd like to go back to Dr. Nagler's report.

2 Q My question is simply: You agree with me that there is
3 evidence that she prorated. Whether or not you're going to
4 say she prorated or not there's evidence. Correct?

5 A I don't know whether or not she prorated, and I don't --

6 Q That's --

7 A That's the only evidence -- the only evidence would be
8 the raw data, and we don't have it.

9 Q But in your report you're saying you have the raw data
10 and that you can rely on Dr. Nagler. Right?

11 A We're missing one page of the raw data.

12 Q But in your report that didn't bother you. Correct?

13 A Again, I think it goes back to this idea of relative
14 weight. We are putting more weight on the -- on the scores
15 for which there is more information. Incomplete raw data is
16 better than no raw data.

17 Q Okay. My question -- back to my question, is you're
18 relying on Dr. Nagler's report. Correct?

19 A Yes.

20 Q Or her score. And Dr. Nagler's raw data shows, one, that
21 there's evidence that Mr. Wilson was not trying. Correct?

22 A I don't think that was correct. That is correct. There
23 is -- she describes impulsive eating. She describes
24 fidgetiness. She says that as -- as questions became more
25 difficult, he became frustrated.

James - Cross/Cohen

1 In my -- in my experience when someone is having
2 difficulty with a task, that behavior, that frustration, that
3 inattentiveness is really secondary to the difficulty the
4 person is having to task. So it's not the fact that he is
5 inattentive that's causing the underperformance, it's the
6 underperformance that's causing the inattention.

7 She never at any point in her report, as far as I've
8 read, says that those scores are invalid.

9 Q She indicates that his head was on the desk at one point.
10 Correct?

11 A That is correct.

12 Q She indicates that he used a careless impulsive approach.
13 Correct?

14 A That's correct.

15 Q Those comments at least indicate that perhaps Mr. Wilson
16 was not giving his full effort. Correct?

17 A That's correct.

18 Q And she also -- okay, so that's one issue. There's also
19 an issue, whether or not you agree with it, there is certainly
20 an issue with respect to prorating with Dr. Nagler. Correct?

21 A That's correct. And again, she never said --

22 Q Okay, you've answered the question --

23 A -- that those scores --

24 Q -- let's move on.

25 So another thing that you mentioned with respect to

James - Cross/Cohen

1 all the reports, besides Dr. Nagler's and Dr. Drob's, is that
2 the other evaluators, or the other psychologists use their
3 quote/unquote gut?

4 A Not all of them. There were specific ones that I noted
5 as being problematic.

6 Q You stated in your report: "In Mr. Wilson's case,
7 several examiners discounted his overall weak performance on
8 IQ measures as being underestimates based on their 'gut'
9 estimates." Correct?

10 A Yes. For example, Dr. Aaronson says that he has average
11 potential. In her report in looking at her scores, there are
12 three of her 12 scores that are in the average range. So she
13 says -- I think that this is a person with average potential
14 but I don't know -- I don't know on what basis she's making
15 that claim.

16 Q Okay. You're claiming that every -- that when the
17 psychologist, it could be Dr. Abramson, Dr. Drezner.
18 Dr. Popp, and actually even Dr. Drob, all said Mr. Wilson
19 scores are -- probably do not reflect his full potential.
20 Correct?

21 A Well, you'd have to point me to each of the -- I don't
22 remember which of the ones said that he was not reaching his
23 full potential.

24 Q Sure.

25 A I don't know that Dr. Popp said that. I think Dr. Popp

James - Cross/Cohen

1 assumed that he was functioning in the average range when he
2 got the information from Mr. Wilson himself. We can take a
3 look at some of the others.

4 Q Sure. Dr. Abramson. Page GOV003924 at the top, third
5 full sentence, or second full sentence I guess. "Earl average
6 WISC-R block design score suggests that whatever delay may
7 obtain it is not pervasive."

8 Going to the next page, GOV003925, "Summary. Earl
9 is functioning below his potential intellectually in the low
10 average range. Emotional concerns interfere with his academic
11 and social functioning." So that was Dr. Abramson?

12 A So I do have a concern with that because you can't use
13 one subtest to make a statement about someone's overall
14 intellectual functioning. His block design was an eight but
15 he has other scores that are lower and other scores that are
16 higher.

17 So you can say if you're concerned that the scores
18 are invalid for some reason that you have a concern because of
19 behavior, but to use one score to suggest that his functioning
20 is at a particular level would not be typical practice.

21 Q But there's no evidence here that she -- I read that the
22 one block design shows that it's not pervasive overall is one
23 common. However --

24 A And I'm not sure how you can make that judgment. How you
25 could say that one score on block design means that the delay

James - Cross/Cohen

1 is not pervasive.

2 Q There's nothing in here saying that he's saying -- that
3 Dr. Abramson is basing the block design on her entire
4 conclusion that he's not operating at his full potential.
5 Correct?

6 A Well, I'm just pointing out the area that you read which
7 suggests that -- you're saying that it's -- whatever delay may
8 obtain it's not pervasive. That seems to be a statement about
9 global functioning. And all I'm saying is that you can't use
10 block design to make an inference about global functioning.

11 Q Okay. Well, that wasn't my implication. Let's put that
12 one aside and just focus on her summary. Right?

13 A Right.

14 Q She stated that "He is functioning below his potential
15 intellectually in the low average range. Emotional concerns
16 interfere with his academic and social functioning."

17 So let's go through them because your point is you
18 didn't remember what they said. I asked you about gut, you're
19 saying you need to go through it. So that's Dr. Abramson.

20 A Right. So there's an example there with using the block
21 design is using her gut to say that his delay is not
22 pervasive. And then to say that he's functioning below his
23 potential, I don't know what evidence she has to say that he's
24 functioning below his potential.

25 Q Well, obviously she was the one -- she took careful notes

James - Cross/Cohen

1 here. Correct? I mean, there are pages of handwritten notes.

2 Correct?

3 A That's correct.

4 Q We can read more of it, if you need to, but she stated in
5 her applications "Earl would seem to need a good deal of
6 supervision to render him available emotionally and" --

7 THE COURT: Cognitively.

8 MS. COHEN: Thank you.

9 Q -- "cognitively for learning. A highly structured
10 educational setting offering predictable reinforcements for
11 accepted behavior e.g., a token economy" --

12 A Economy.

13 Q -- "may gradually shape his school behavior to
14 approximate propriety."

15 THE COURT: Propriety.

16 Q "He is a sensitive and emotional fragile child who
17 appeared to need a great deal of support from --

18 THE COURT: Concerned.

19 Q -- "concerned professionals."

20 THE COURT: You want me to read it?

21 Q Just a couple of words. I want to make sure I've gotten
22 them right.

23 "A carefully planned systematic management approach
24 may help him function academically at a level commensurate
25 with his intellectual potential."

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1 We can go on but obviously there's nothing in there
2 that's saying she is drawing the conclusion about this based
3 on block design. Correct?

4 A Well, the first section that you read about block design
5 does suggest that. Her summary talks about this idea of
6 functioning below his intellectual potential. But, again, I'm
7 not sure on what she's -- when you look at the scores, I'm not
8 sure that there is anything there that would suggest that he's
9 functioning below his intellectual potential.

10 Q But you agree with me early -- or when we talked on
11 Saturday that clinical judgment is particularly important when
12 giving an IQ test. Correct?

13 A Clinical judgment that's based on data, not just on your
14 gut.

15 Q There's nothing in this report to indicate that
16 Dr. Abramson was not using her clinical judgment but was in
17 instead using her gut. Correct?

18 A I disagree with that. Just because, like I said, to say
19 that he's functioning below his intellectual potential, I'd
20 like to see the data that would suggest that.

21 Q Dr. Abramson was there observing Mr. Wilson when he took
22 this test. Correct?

23 A That's correct.

24 Q She was aware of what was going on, presumably, in his
25 life at that time?

James - Cross/Cohen

1 A That's correct.

2 Q And she made an overall assessment in this report based
3 on her clinical judgment in combination with his IQ scores.
4 Correct?

5 A That's correct.

6 Q Okay, moving on to Dr. Drezner.GOV0003932. "Summary.
7 Earl's borderline IQ of 78 appears depressed as a function of
8 emotional and cultural factors. Earl's true cognitive ability
9 appears to be low average, average." Correct?

10 A It's correct that she's saying that. I don't know that
11 it -- I don't know that that's a correct assertion.

12 Q Now, at this time Mr. Wilson was in special education for
13 the emotionally disturbed. Right?

14 A That's correct.

15 Q Dr. Drezner had that kind of information when she
16 rendered this, one, two, three, four -- five-page handwritten
17 report. Correct?

18 A That's correct.

19 Q So your testimony is this was is another gut. Is that
20 what your testimony is?

21 A When I -- my testimony is that to say that it appears
22 depressed, there are many factors that can contribute to poor
23 functioning on an intellectual measure, emotional factors,
24 cultural factors, but it's -- but it also could be simply that
25 this person has intellectual deficits and that's why they're

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1 underperforming.

2 So to say that -- and certainly emotional and
3 cultural factors contribute, but she's making the statement
4 that that is the reason for the depression in the IQ score
5 saying that he is functioning in the low average to average
6 range. Again, where -- I don't know where she's -- where she
7 has the evidence in her data to support that.

8 Q Well, clearly some of the scores could also -- first of
9 all, clinical judgment, right, is one factor?

10 A Clinical judgment is one factor, but we've got, one, two,
11 three, four, five, six, seven, eight, nine, ten scores, three
12 of which are in the average range.

13 Q Okay. When Dr. Drezner is doing this report she's in the
14 classroom, correct, or she observed him in the classroom?

15 A I don't know if she was observing him in the classroom.
16 I don't know where it says that she was.

17 Q Okay. There is -- I can point it to you but --

18 A Okay.

19 Q -- there's a point where she watches him while he's in
20 the classroom.

21 A Right.

22 Q She interviewed his teacher. Correct?

23 A Right.

24 Q He is in, as I said, a school for the emotionally
25 disturbed. So these people are dealing with Mr. Wilson on a

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1 daily basis. Correct?

2 A That's correct.

3 Q So part of the emotional concerns there are clearly based
4 on the total picture of the person. Right?

5 A That's correct.

6 Q Okay. And some comments by -- could often be based on
7 how a person performs on particular subtests. Correct?

8 A That's correct.

9 Q All right. So now let's move on. Let's go to --
10 Dr. Giglio we already spoke about. Correct? We said that he
11 could not render a full scale IQ because there was a
12 discrepancy between the performance and the verbal. Right?

13 A That's correct.

14 Q And his conclusion on GOV004019 is that Earl has a
15 learning disability and language disability. Correct?

16 A Yes.

17 Q Let's go to Dr. Drob. Dr. Drob also said on GOV004027:
18 "The discrepancy between Mr. Wilson's verbal comprehension
19 index and his perceptual organization index is highly
20 suggestive of a learning disability in the verbal sphere."
21 Correct?

22 A Yes. He also pointed to in the first bullet point that
23 the results of cognitive testing conducted in October 2003
24 when Mr. Wilson was age 21 are clearly indicative of his
25 limited intellectually functioning.

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1 Q And he also said on GOV0004028 "At normal range and
2 higher scores on two nonverbal subtests suggest a higher
3 intellectual potential and that Mr. Wilson's cognitive
4 functioning has been compromised by learning
5 disabilities/neuropsychological factors." Correct?

6 A He did say that. He also talks about broad --

7 Q My question is whether or not he said that.

8 A He did say that.

9 Q Okay. And the following page at GOV004029, Dr. Drob
10 said: "The above results are commensurate with Mr. Wilson's
11 history of special education, the tests scores he obtained on
12 a number of occasions throughout childhood and adolescence and
13 reported observations of school psychologists and others who
14 examined and worked with Mr. Wilson during his school years."

15 He said that as well. Correct?

16 A He did say that.

17 Q And Dr. Drob has been doing -- he's an experienced
18 psychologist. You would agree with that. Correct?

19 A That's correct.

20 Q And he teaches at NYU. Correct?

21 A That's correct.

22 Q And he worked at Bellevue for 20 years. Correct?

23 A That's correct.

24 Q So you would agree that Dr. Drob has much experience
25 giving these kinds of IQ tests and making evaluations based on

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1 those tests as well as the records. Correct?

2 A That is correct. Although, my concern here is that with
3 Dr. Drob, he did obtain a full scale of 76, which he didn't do
4 any -- I mean, he's an experienced psychologist, but he didn't
5 do -- I'm concerned that he didn't do any correction for
6 outdated norms. He have also didn't build any confidence
7 intervals around his results. If he had, he would have found
8 an IQ score of 73, which would then -- should have led him to
9 other considerations, such as mental retardation.

10 Q Okay. So you're now -- you're saying -- your testimony
11 is that Dr. Drob also has issues. Correct?

12 A Well, in the sense that I'm concerned that he did not
13 look at these scores and make the necessary corrections in
14 order to consider other things diagnostically. He did talk
15 about low intellectual potential and he talked about some of
16 these greater neuropsychological deficits. He didn't
17 specifically go into looking for intellectual disability, but
18 I think that there was data enough to do that.

19 Q And you were aware at this time, as Dr. Drob testified,
20 and he was doing this test -- this testing when the Staten
21 Island D.A.'s Office was determining whether or not to seek
22 the death penalty. Correct?

23 A That is correct.

24 Q And a in way which they would not seek the death penalty
25 is if Mr. Wilson was considered or was found to be

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1 intellectual disabled or mentally retarded. Correct?

2 A Correct.

3 Q Despite that, your testimony is that Drob was also using
4 part of his gut. Is that correct?

5 A I'm not saying -- No, I didn't say that he was using his
6 gut. I said that he could have given the scores he obtained,
7 done additional look -- given an additional look, for example,
8 to adaptive behavior. If he had done the appropriate
9 corrections for obsolete norms, if he had looked at confidence
10 intervals, he would have found a score that I think would have
11 warranted going further in making that assessment. And he
12 does indicate elsewhere in his summary this idea of limited
13 intellectual and broader neuropsychological deficit.

14 Q So your testimony is that Dr. Drob worked at Bellevue for
15 20 years, who has been a psychologist for it must be 43 years,
16 I don't know, teaching at NYU, and was doing this examination
17 to look for indication of mental retardation that he should
18 have done more. Is that your testimony?

19 A I agree.

20 Q And that his conclusion that Mr. Wilson did not have
21 mental retardation should not be weighted. Is that your
22 testimony?

23 A I don't see anywhere where he concludes that he does not
24 have mental retardation.

25 Q If he had found mental retardation, the Staten Island

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1 D.A.'s Office, they agreed would not have sought the death
2 penalty. Correct?

3 A That's correct.

4 Q Before we get into the achievement testing, one last
5 question. We talked a little bit on Saturday, we talked about
6 the discrepancy between the verbal IQ and the performance IQ.
7 Correct?

8 A That's correct.

9 Q We agreed that you can't -- you don't take an IQ test and
10 diagnose or not diagnose someone with a learning disability
11 based on that discrepancy. Correct?

12 A That's correct.

13 Q However, what we also discussed is that that profile is
14 consistent throughout studies in someone with a learning
15 disability. When I say "that profile," I mean performance
16 greater than verbal. Correct?

17 A It's a profile that can be seen in people with learning
18 disabilities but it's not diagnostic.

19 Q Now, there have also been studies that the opposite -- or
20 not the opposite, but in individuals with mental retardation
21 they have not seen that large discrepancies. Correct?

22 A That's correct.

23 Q And in fact, according to the Kaufman, same report that
24 we were looking at in Exhibit B, page 335. And on page 335.
25 I'm sorry.

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1 A Yes.

2 Q And this was a study that -- in the first column, I mean
3 the page prior says WAIS and WAIS-R IQ profiles. And then on
4 page 335 the discussion is about a study of 863 individuals.
5 Do you see that, in the first column?

6 A Yes.

7 Q "Males and females and African Americans and
8 Caucasians" --

9 A Yes.

10 Q -- "whose mean chronological ages range from 16 to 47."

11 A That's correct.

12 Q "Of the 14 samples, ten had a performance greater than
13 verbal profile of one to 7 points, while four groups had a
14 verbal greater than performance of 1 to 3 points. Overall,
15 the weighted mean performance greater than verbal discrepancy
16 for the 14 samples equal 2.7 points, suggesting a slight
17 tendency for samples of adolescents and adults with mental
18 retardation to score higher on the performance than verbal
19 scale. However, three of the four samples showing strongest
20 performance greater than verbal profiles being a discrepancy
21 of 7 points had mean performance IQs of 84 to 86, suggesting
22 that definitions of retardation may be a bit lax in some
23 investigations. For those appropriately diagnosed as mental
24 retarded, a performance greater than verbal profile may be
25 nonexistent."

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1 And then in the next column at the top, it says:
2 "Thus, the performance greater than verbal profile does not
3 seem to be characteristic of adolescents and adults with
4 mental retardation and the opposite profile may well
5 characterize individuals with IQs in the moderately or
6 severely retarded range."

7 Did I see read that correctly?

8 A You did read that correctly.

9 Q And that is also consistent with the WAIS-IV manual which
10 indicates on page 102, and that says: "Many studies have
11 been conducted to evaluate performance of individuals with
12 intellectual disabilities on previous versions of the Wechsler
13 Intelligence Scale. The prevalence of large and unusual
14 discrepancies between verbal and nonverbal composite scores
15 have been shown to decrease with decreasing levels of ability.
16 In addition, the standard deviations for composite and subtest
17 scores have been shown to be smaller for individuals with
18 intellectual disabilities and for individuals in the general
19 population. Thus, there appears to be less variability in
20 performance at both the composite and subtest levels for
21 adults with intellectual disabilities and for adults in the
22 general population."

23 So what these two studies -- or what the study in
24 the Kaufman chapter is saying and what the WAIS-IV manual is
25 saying, is that typically in mental retardation we do not see

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1 a large discrepancy between performance and verbal. Correct?
2 Or at least with mild mental retardation?

3 A I would actually disagree with that because if you look
4 at page 334, the second column under WAIS and WAIS-R IQ
5 profiles, the first sentence says: "The data available in
6 the characteristic WAIS or WAIS-R profiles individuals who are
7 mentally retarded do not yield consistent a VP profile." That
8 is to say there is no consistent profile that you would expect
9 to see in individuals with intellectual disability.

10 Q What they're saying and the rest of everything I read is
11 that maybe there's not a consistent, but you do not see a
12 large discrepancy between performance and verbal with mild
13 mental retardation. Correct?

14 A No, that's not correct. Because it's -- the first -- the
15 sentence that I just read to you says that there really is
16 no -- there is no consistent profile. We can't use a
17 profile -- VP profile to make a diagnosis. And that's what
18 Kaufman is saying, there is no consistent profile.

19 So you can't take a look at someone's -- even -- you
20 can't take a look at someone's profile in terms of their
21 verbal and performance and infer a diagnosis from that. It's
22 just -- he says it's not -- it's not consistent.

23 Q What Kaufman says in all the rest of this, when he
24 discusses -- after he makes that statement, he discusses
25 specific studies that are done and as well as the WAIS-IV,

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1 which demonstrates that "typically you do not see a large
2 discrepancy between verbal and performance." Correct?

3 A I don't think that he's saying typically. Because he's
4 saying that it's something that is possible. Again, you can
5 have a lot of different verbal performance profiles and they
6 can be mean different things. You can see that in reading
7 disability. As I mentioned earlier, sometimes someone with a
8 reading disability has lower verbal than performance. But not
9 always.

10 What he's saying, the studies are showing various
11 samples, talking about groups that may have this profile. But
12 if you look at any one individual, you have to look at that
13 individual on its own merits and use your clinical judgment in
14 that. You can't just look at a profile and then automatically
15 intuit a diagnosis.

16 Q My question is whether or not these studies, as well as
17 the WAIS-IV manual demonstrate that, as Dr. Kaufman says, for
18 those appropriately diagnosed as mentally retarded a
19 performance greater than verbal profile may be nonexistent.
20 In other words, we do not typically see in studies a large
21 discrepancy between verbal and performance. Correct?

22 A That wouldn't -- I don't think that's what he's trying to
23 say, number one. And it doesn't correspond with my experience
24 in seeing hundreds of people with intellectual disability. I
25 mean, sometimes they have variability in their performance as

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1 Mr. Wilson does. Sometimes they don't.

2 THE COURT: I think we've exhausted this subject.

3 MS. COHEN: Okay.

4 THE COURT: Let's move on.

5 MS. COHEN: Okay. We'll move on.

6 Q Let's go into your achievement test which is the last
7 thing I want to review.

8 Now, I'm going to put your achievement test up on
9 the Elmo so that we can go through it at the same time.

10 And what I put up on the Elmo is -- this is your --
11 the results of your -- the testing that you gave. Right?

12 A Yes, that's correct.

13 Q Now, the first test is the Delis-Kaplan Executive
14 Functioning System Test. Correct?

15 A That's correct.

16 Q And this test by the way is not correlated with
17 education. Right? It's not corrected for education. Right?

18 A When you look up the scores for this test, they're age
19 based. They're not education based, they're age based norms.

20 Q So you disagree that this has -- you would say this has
21 nothing to do with education?

22 A Oh, no, I didn't mean that it doesn't have anything to do
23 with education. There is -- I don't know what the specific
24 relationship is between education and executive functioning, I
25 imagine that there is some correlation, although I wouldn't

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1 imagine it to be very high. I don't know the specific
2 correlation. All I'm saying is that when you look up the
3 scores the scores are by age, not by education.

4 Q Right. So this test -- test taps into executive control
5 process. Right?

6 A Aspect of executive functioning, yes, such as initiation,
7 flexibility, planning and organization, et cetera.

8 Q And these, as we agree, are important things to look at
9 with someone with mental retardation to determine that fact.
10 Correct?

11 A It's not part of the core diagnosis, but certainly it's
12 information that you would consider in thinking about broader
13 areas of neuropsychological deficits, broader areas of deficit
14 in real world functioning.

15 Q And when we say that, just to make sure we're talking
16 about the same thing, what you just said, the intuition, the
17 planning, those aspects of intelligence. Correct?

18 A Yes.

19 Q All right. Now, looking at the Delis-Kaplan test,
20 Mr. Wilson, going down -- and let's just focus on the core
21 scores. In other words, I'm not going to talk about the
22 comparison scores.

23 A Okay.

24 Q Let's talk about this. And Mr. Wilson on these scores
25 got pretty much average and one high average. Right? He had

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1 a nine, eight, a nine, and then a 12?

2 A I actually consider a 12 is the high end of the average
3 range.

4 Q Well, according to the WAIS-IV, where I obtained this
5 information, 12 is considered above average. You consider it
6 average? Is that your testimony?

7 A I consider it the high end of the average range.
8 These -- I know that this comes from the WAIS-IV, but there
9 are other score conversion charts. There's a little bit of a
10 disagreement about what constitutes what, where the boundaries
11 are. So it's the high end of the average range is how I look
12 at it.

13 Q All right, so we'll call these average. Now, going again
14 down to composite total correct. Again, we have a seven, and
15 a six. Those are in the low average range --

16 A Low average range.

17 Q -- correct?

18 A Yes.

19 Q And 13 which you would agree is the high average range.

20 A High average range, yes.

21 Q And a nine which is in the average range. Correct?

22 A Right.

23 Q And going down, again, all the way down to combined
24 letter number -- I'm sorry, motor speed.

25 A Actually, let's take a look at the way in which this test

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1 works. The scores that -- if you don't mind, the scores that
2 you should be looking at are visual scanning, number
3 sequencing, letter sequencing, number/letter switching and
4 motor speed, because they all relate to each other. So you
5 need to consider -- those other subtests are subtests that
6 these, especially those -- well, the five are really a set
7 that you're looking at.

8 Q Okay. I'm sorry, I'm going down now to the trail making
9 test. Correct?

10 A Yes. So you really are looking at the first five
11 subtests.

12 Q Right. Which is what I was about to do.

13 A Okay, I apologize.

14 Q Okay. So we've got an 11, a 13, 11, 7, and 12?

15 A Yes.

16 Q So those scores would be a one in the low average?

17 A Yes.

18 Q The rest are in the average, and actually one is in the
19 high average. Correct?

20 A Yes. And the significance of that discrepancy is it's a
21 very big discrepancy --

22 Q Dr. James, we're going to be here all day. My question
23 simply was: Is that correct?

24 A That is correct, yes.

25 Q Going down to the measure of color-word interference.

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1 A Yes.

2 Q So far Mr. Wilson has done pretty average on these, a
3 couple of low average but he's gotten some average scores.
4 Right?

5 A He's gotten some average and some ones that are low
6 average.

7 Q Right. Now, going down, color naming is the first time
8 you see a borderline score?

9 A Yes, that's a very significant low score,
10 fifth percentile.

11 Q That score also -- column for that test, color naming --

12 A Yes.

13 Q -- color naming is also one of the subtests in the rapid
14 naming test. Are you familiar with that test?

15 A No, I'm not familiar with that test.

16 Q You're not familiar with the RAN/RAS test?

17 A Oh, yes, I am. Yes.

18 Q And that test is for dyslexia. Correct?

19 A It tests for fluency in naming overlearned sequences. So
20 it's something that can be used in assessment of reading
21 disability, but it can also have other meanings. One's
22 ability to rapidly produce overlearned information can be
23 affected for many reasons.

24 Q It's often used to test children for dyslexia and for
25 other learning disabilities. Correct?

James - Cross/Cohen

1 A Yes, it is.

2 Q And color naming is one of the subtests in that
3 particular test, the RAN/RAS test. Correct?

4 A Yes, it is.

5 Q Now, word reading and inhibition, Mr. Wilson obtained low
6 average scores. Correct?

7 A That is correct.

8 Q And on the next page, again, he got a low average in
9 inhibition and switching?

10 A That's correct.

11 Q Now, going down to the measure sorting test.

12 A Yes.

13 Q Here?

14 A Yes.

15 Q Mr. Wilson on the first two scores obtained average of
16 11. Right?

17 A That's correct.

18 Q And on the sort recognition description score, that's
19 where he had a problem. Right?

20 A Very significant.

21 Q Right. That went down to three?

22 A Yes.

23 Q And that's where it's actually considered mild
24 intellectual disability score of three, or it be would be more
25 consistent. Right?

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1 A It's a low -- it's an extremely low score.

2 Q And that score, or that test is basically -- or the
3 confirmed correct sorts and free sorting description score,
4 the third one which we just said is sort recognition
5 description score, is -- is -- he had to sort the cards and in
6 this subject he had to describe them. Correct?

7 A No, that's actually not correct. In the first two -- in
8 the first two tests, he had to sort the cards and describe
9 them. In -- that's that confirmed correct sorts and the free
10 sorting description score, those are derived from his being
11 given six cars and he has to then sort them in as many
12 different ways as he can. He also has to describe the way in
13 which he sorted them.

14 The difference between that and the third score, the
15 sort recognition description score, is that I actually sorted
16 the cards and he had find the underlying principle by which I
17 sorted them. And he was unable to strategize to find the
18 underlying concept by which I had sorted the cards. So he was
19 actually asked to describe how I had done them, what was the
20 rule and he couldn't do it.

21 Q Okay. So in the free sorting description score, that
22 definitely taps into some kind of intellectual functioning,
23 right?

24 A Yes, it does. It taps into his ability to categorize
25 information. But the contrast, like I just mentioned, is that

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1 when it's in front of him and he was able to look at the cards
2 and look at -- the cards have different colors or different
3 words on them, he could do it. But when I was the one doing
4 the sorting and he didn't have anything in front of him to
5 really help him, he couldn't figure out what the rule was.

6 Q He couldn't describe it. Correct?

7 A He couldn't figure out -- it was more than not being able
8 to describe it, he had no idea how I had sorted them.

9 Q All right. So your testimony is that this has nothing to
10 do with language and the description part of it?

11 A There is very little to do with language. Because the
12 actual -- the language is not complicated. It's like saying
13 these three are blue and these three are yellow. So the
14 language demand in that task is not high. These three have
15 red on them, these three have white on them. It's really
16 underlying conceptual idea of being able to figure out how I
17 had sorted the cards that he could not do.

18 Q Okay. So when he was sorting them, that's where he hit
19 the average. Right?

20 A Yes.

21 Q All right. Now moving on to the 20 question test.

22 A Right.

23 Q Now, in your raw data in this test you indicated that
24 Mr. Wilson had trouble understanding the instructions.
25 Correct?

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1 A Yes, that's correct.

2 Q And the instructions on the 20 questions are that -- I'll
3 just read them so we're all on the same page. "Now we are
4 going to do something where you ask me questions. I picked
5 one of these pictures and I want you to figure out which one
6 it is by asking me questions. You can only ask one question
7 that I can answer yes or no. You can ask any question at all
8 as long as I can answer it yes or no. Try to guess the
9 picture that I have picked with the fewest number of questions
10 you can. I'm going to write down your question so I can
11 remember them. Go ahead and ask me the fewest number of
12 yes/no questions, if you can, to figure out which picture I
13 have selected."

14 That's the instructions that --

15 A That's correct.

16 Q -- Mr. Wilson had difficulty with?

17 A Yes. I had to explain them to him several times.

18 Q Okay. Those instructions you agree aren't actually the
19 clearest instructions. Right?

20 A You know, in my experience most people who have the
21 intact language skills can understand them. I mean, it's a
22 lot of information. I thought it was remarkable that he had
23 trouble understanding the instructions and I had to explain
24 them to him as many times as I did. I mean, I felt that was
25 consistent with other tasks that I had done where he was

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1 listening to sentences or paragraphs and couldn't pick out the
2 information that he needed in order to answer the question.

3 Q All right. But, actually, what is also surprising is
4 that in his test, Mr. Wilson did very well. Correct? I mean,
5 he -- in the initial abstract score he had a ten, which is
6 average. Right?

7 A That's correct.

8 Q And then he had a 13 and a 14, which is above average.
9 Correct?

10 A That's correct. And what was remarkable about that --

11 Q My question is whether that's correct or not.

12 A That's correct.

13 Q And you would agree that this test taps into problem
14 solving. Correct?

15 A To some extent, yes.

16 Q All right. In moving on, the following -- the next test
17 is the word context test. Right?

18 A Yes.

19 Q And that Mr. Wilson scored a little lower?

20 A Yes. He scored at the ninth percentile for age on that
21 test.

22 Q This is a low average score of six. Correct?

23 A Yes, it's quite a low score.

24 Q And that also is more of a verbal test. Correct?

25 A There are verbal elements, but the test is also, again,

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1 kind of similar to when we talked about the problems he had on
2 sorting recognition. It's about using feedback, using
3 information, progressive amounts of feedback in order to
4 guess -- it's kind of almost like a riddle, so you're given
5 increasing amounts of information to then make a determination
6 of an underlying concept, a word. And so he struggled with
7 that.

8 Q Okay. So my question is this does tap into some verbal
9 learning. Correct?

10 A Yes, as well as some conceptual learning.

11 Q And going to the tower test, in this Mr. Wilson did not
12 score well. Correct?

13 A Yes. That's a complex test involving strategy
14 generation. He has to determine in as few moves as he can to
15 make the -- the wooden block, or the wooden disks on his tower
16 he look like mine in as few moves as possible. So there's
17 element there of strategic thinking, trying to do the task in
18 as few moves as possible and it's also timed. And he really
19 struggled to put it all together.

20 Q And this test is also difficult for people who are
21 impulsive. Correct?

22 A Yes. And I did not note any impulsivity.

23 Q My question -- if you could listen to my questions and
24 answer them. My question: The people who are impulsive often
25 have difficulty on this test. Right?

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1 A That is true.

2 Q And this includes, by the way, the second percentile.

3 Okay, going down to the proverb test, Mr. Wilson on the free
4 inquiry scored in the low average here. Correct?

5 A Yes.

6 Q But he did much better on the total achievement score of
7 the multiple choice. Correct?

8 A Yeah, I think that's definitely remarkable because he
9 did --

10 Q My question is just whether or not that was correct.

11 A Yes, when given structure --

12 Q Okay.

13 A -- he was able to perform that.

14 Q If you would listen to my questions and answer them, and
15 you can talk all you want on redirect. So we can get through
16 this. All right.

17 So he was in the 29 percentile which is average.

18 Now, the total achievement score of the free inquiry is also,
19 you would agree, heavily influenced by language and education.
20 Correct?

21 A I think that there's definitely a component of language
22 ability and education but it's also, you know, as it says,
23 it's a proverb test, so there's obviously a degree of abstract
24 thinking that is necessary to do well.

25 Q Okay. Now, going down to the Wisconsin sorting test,

James - Cross/Cohen

1 Mr. Wilson scored in the average and higher on this entire
2 test. Correct?

3 A Yes, he did very well on this test.

4 Q And this test is actually norm for education. Correct?

5 A This test, no, it's not. We didn't -- when I looked it
6 up, the scores, I didn't adjust for education, only age.

7 Because you don't apply a demographic norm such as education
8 and race when you're looking at the absolute performance on a
9 task. So this is actually adjusted for age only.

10 Q Well, I'm not asking if you have adjusted it, I'm saying
11 that the test itself has been norm for education, so that it's
12 not skewed against those who do not have education. Correct?

13 A That's correct. Yeah.

14 Q And those scores are in the high average. Correct?

15 A Yes.

16 Q Now turning to the California verbal learning test, up
17 here.

18 A Yes, that's correct.

19 Q Mr. Wilson scored in the average for semantic cluster.
20 Correct?

21 A Yes, that's correct.

22 Q He scored in the above average for perseverations.
23 Right? I'm sorry, he scored in the low average?

24 A Its a reverse score, so it didn't -- and that means that
25 he didn't do a lot of perseverations.

James - Cross/Cohen

1 Q Right. So he scored in the low average on that?

2 A In contrast, he had an extremely high number --

3 Q High number. I got these two confused. The
4 perseverations he scored high and intrusions he scored lower?

5 A It's actually the opposite. He did not have many
6 perseverations but he had an unusually high number of
7 intrusions; that is to say, he included, when he was freely
8 recalling the list, he said a high number of words that were
9 actually not on the original list. So --

10 Q He did better on intrusion versus perseverations?

11 A No, no. A high score is bad. You're not supposed to
12 have a high number of intrusions. What it means is that
13 saying words that were not actually on the list, and you're
14 not able to keep in your mind the words that were on the list
15 versus the words that were not on the list. So a high number
16 of intrusions is a bad -- that's a bad score.

17 Q So he scored in the average and low average on these two.
18 Correct?

19 A Well, if you look at the reverse score for the
20 intrusions, that's a very poor score, it's just reverse
21 scoring.

22 Q On the intrusions?

23 A Yes.

24 Q And the preservations he scored in the average?

25 A Yes. He didn't have -- you can't really say average or

James - Cross/Cohen

1 not average. He didn't have very many preservations so he did
2 well there.

3 Q Okay. So he did better there?

4 A Yeah.

5 Q Now, this -- this testing -- again, these are just --
6 we're talking -- we're saying better or worst, we're talking
7 average and low average. Right?

8 A Yeah. You mean in general or --

9 Q Yes, in general.

10 A Oh, in general, we're talking about scores ranging from
11 extremely low age expectations to above average. He has a lot
12 of variability in all of these, in this entire profile.

13 Q There's no borderline scores in here. Right?

14 A Well, when you say borderline scores.

15 Q Well, I'm -- just to give us some kind of 4, 5,
16 2 percent, 5 percent, we're more talking in the -- would be a
17 low average. I'm talking --

18 A He has --

19 Q It would be a borderline.

20 A He hasn't significantly -- if you go back to that page
21 you just looked at, for example, the tower test was a
22 fifth percentile.

23 Q We're focusing on the California?

24 A Well, I was just asking if you meant generally and you
25 said yes.

James - Cross/Cohen

1 Q Oh, I'm sorry. I thought you meant in general on the
2 California.

3 A No, no. Generally he had scores that range from
4 extremely low expectations to above average.

5 Q On the California on verbal, just to summarize, we're
6 talking average and low average scores. Correct?

7 A No, actually because there is another page here under
8 learning and memory for California verbal learning.

9 Q We haven't gotten -- I'm talking about the California
10 verbal learning, the little block that we're looking at right
11 now.

12 A Yes. But it's an entire test. It's just separated by
13 two.

14 Q Right. In this particular part --

15 A In this particular block.

16 Q -- the scores we've reviewed are low average and average?

17 A Yes. And that's the block that dealing with particular
18 kinds of errors you might see on the test.

19 Q All right. So now going back to the Boston naming test.

20 A Yes.

21 Q This test Mr. Wilson scored pretty very poorly on.
22 Correct?

23 A Yes, very poorly.

24 Q And this test, this --

25 THE COURT: I'm sorry, I missed that.

James - Cross/Cohen

1 THE WITNESS: Very poorly.

2 THE COURT: Okay, thank you.

3 Q This test does not correct for education, and it's not
4 norm in and of itself for education. Correct?

5 A Of the -- you can use -- there are norms that you can use
6 for education, 12 years of education and above or below 12
7 years of education. It's primary norm on the basis of age.
8 There are many different kinds of norms for the Boston naming
9 test.

10 Q Now, the Boston naming test shows some pictures.
11 Correct?

12 A That's correct.

13 Q And these pictures the person was shown and has to state
14 what they are. Right?

15 A That's correct.

16 Q And it first starts with them being able to say it
17 spontaneously. Right?

18 A Yes, that's correct.

19 Q And then if they can't get it, you give them clues?

20 A That's correct.

21 Q And some of the ones that Mr. Wilson got wrong were -- I
22 actually have some of --

23 A Yes, that's correct.

24 Q You said that was a boat?

25 A That's right.

James - Cross/Cohen

1 Q Palace, right, he got at that one wrong?

2 A That's correct.

3 Q Abacus, he got that wrong?

4 A Yes, that's the last item on the test. Right.

5 Q He got hammock wrong. Correct?

6 A That's correct.

7 Q He got sinks wrong. Right?

8 A That's correct.

9 Q You'd agree -- well, a trellis is another one. Right?

10 A That's correct.

11 Q You would agree that these tests are difficult for
12 somebody who, one, has not had a lot of formal education.
13 Correct?

14 A Yes. Education -- well, what I would say is that
15 education is a factor --

16 Q Right.

17 A -- in being able to -- in -- yeah, education is a factor
18 in vocabulary development.

19 Q As well as someone's background. Correct?

20 A That's correct. However, his score is so low --

21 Q Okay. So my question is whether --

22 A It's about five standard deviations below the mean.

23 Q My question is whether background affects someone's
24 ability to score on the Boston naming test?

25 A That is correct.

James - Cross/Cohen

1 Q And that is why when it is given some people actually
2 correct for education or ethnicity. Correct?

3 A Yes, but you would not do it -- you would not --

4 Q My question is --

5 THE COURT: Let her finish.

6 A You wouldn't --

7 THE COURT: If you want it struck, you can ask to
8 strike it, but I need to hear the whole answer, otherwise the
9 court reporter and I are not going to have the information we
10 need.

11 MS. COHEN: Okay.

12 THE COURT: Go ahead ma'am.

13 A What you're talking about is making corrections,
14 demographic corrections beyond age for education and race.
15 That is a practice that is done. However, it's not -- it's
16 mostly done in situations where you're comparing someone's
17 premorbid performance to their performance after, for example,
18 an injury.

19 So if someone had a head injury and you knew what
20 they were like -- and you knew what they were like before and
21 you wanted to see what they were like now after the injury,
22 you wouldn't want to have confounding variables such as race
23 and education in the mix when you were looking at how much
24 that person had recovered. It applies mainly to -- those
25 kinds of demographic corrections apply mainly to situations in

James - Cross/Cohen

1 which there is acquired injury.

2 In developmental disorders, you don't make that same
3 kind of correction because what you're looking at is someone's
4 absolute performance on a test. When you're making a
5 diagnosis, you're looking at absolute performance. So you
6 wouldn't make that kind of a correction here.

7 Yes, there is an influence of education on the
8 Boston naming test, but in this situation what we have is
9 someone who is scoring five standard deviations below the
10 mean.

11 Q You would agree that someone who grew up in Staten Island
12 in a depressed environment who didn't have formal education
13 might have difficulty recognizing some of these pictures.
14 Correct?

15 A That is correct.

16 Q Moving on to the California -- now we'll go into what we
17 were talking about before, the learning memory. Right?

18 A Yes.

19 Q The California verbal learning test, which you're saying
20 is a part of the California verbal test?

21 A Yes, that's correct.

22 Q Right.

23 Now, Mr. Wilson, again, in this area was more
24 difficult for him. Correct?

25 A Yes. His overall score is two and a half standard

James - Cross/Cohen

1 deviations below the mean.

2 Q And this you would agree does tap into verbal learning.

3 Correct? Verbal reading. Right?

4 A I would say that the California verbal learning test,

5 like many of these tests, tap into multiple areas. Verbal

6 ability would be one, but it's a verbal memory test so it also

7 assesses aspects of executive functioning such as working

8 memory, organization.

9 Q Okay. We talked about the Rey-Osterrieth --

10 Osterrieth -- I'm not pronouncing --

11 A Osterrieth, yes.

12 Q Osterrieth test, which is part of this learning memory

13 area?

14 A Yes, it is.

15 Q And just stop we're clear, this is the -- the drawing?

16 A Yes, that's correct.

17 Q And when you give this part of the test, the test taker

18 has to copy this.

19 A That's correct.

20 Q And then you -- you wait a little bit. Right?

21 A That's correct.

22 Q And you ask them to draw it without looking?

23 A That's correct.

24 Q And then you move on to some other stuff. Right?

25 A That's correct.

James - Cross/Cohen

1 Q And then much later you go out -- you go back and you
2 say, remember that figure --

3 A That's correct.

4 Q -- let's draw it again. Right?

5 A Yes.

6 Q And you would agree that -- or in your report you
7 indicated that Mr. Wilson had trouble copying that. Correct?

8 A Yes, he had -- his -- he had difficulties. Copying it,
9 when I say trouble copying it, I mean that the approach that
10 he took to copying it.

11 Q Now, with this figure -- let's put up. Mr. Wilson, this
12 is what his copy was. Right? So I can actually put these
13 side by side. There's what you're supposed to copy. Right?
14 And he -- he did not, he left several things off. Correct?

15 A Is that his actual copy or is that his immediate?

16 Q Well, it's written copies at the bottom.

17 A Okay. Okay. That's his copy.

18 Q So that's his copy. Right?

19 A Yes.

20 Q And you would agree that copying is much easier than the
21 immediate and the delayed part of the test. Correct?

22 A Yes. I mean, they're assessing different elements, yes.

23 Q And this is Mr. Wilson's immediate?

24 A Yes.

25 Q So, he did much better with the immediate? Again, here's

James - Cross/Cohen

1 what he was supposed to draw and there's what he drew. Right?

2 A Yes. And in fact, when I'm looking at this, I should
3 clarify, it's not the actual -- he has relative strengths in
4 some aspects of his visual-spatial functioning. So it's not
5 the actual representation that I'm looking at as far as the
6 copy of it. The visual-spatial elements and the relationship
7 to each other. What I mentioned in my report was really the
8 approach that he took to copying it.

9 Q Okay. Now let's look at the --

10 A And the fact that that was disorganized.

11 Q This is Mr. Wilson's delay. Right?

12 A Yes.

13 Q And again, the immediate and the delay, he's not looking
14 at the drawing, are much better. Right?

15 A Yes. And this is consistent with some of the visual
16 memory testing that I gave him where he performed better on
17 simple visual memory types of tasks. Again, it's his approach
18 to the test that I was concerned about, that his approach to
19 the task was somewhat haphazard and disorganized.

20 MR. BURT: Your Honor, can we have a designation
21 what Bates stamp number she was just referencing.

22 THE COURT: Yes, of course.

23 THE PLAINTIFF: Sure. I was looking at GOV, the
24 first one, 010604, 10605, and 10606.

25 MR. BURT: Thank you.

James - Cross/Cohen

1 Q You would agree, it doesn't make sense that a person who
2 was copying a drawing would do much worse at the copying than
3 in the immediate and the delayed. Correct?

4 A Well, I think it's difficult to assess much worse. I
5 don't think he did much worse. I think that what can happen
6 over time -- and again, my focus was not on the copy itself,
7 because -- or any of the copies, the immediate or the delayed.
8 Only because, again, that's about the visual-spatial aspect of
9 it. What I'm concerned about is his approach to the task.

10 It is not uncommon for someone after, especially
11 someone who has trouble taking in a lot of the information
12 originally when they're copying it, to then have -- with a
13 little bit of a delay and then with a longer delay, be able to
14 recover some of that information. I see that often.

15 Q Okay. So when the person is actually looking at the
16 drawing and copying it, and leaving off several aspects of it,
17 that doesn't strike you as odd in the fact that they
18 remembered those other aspects in the immediate and delayed
19 recall?

20 A Yeah, I think that sometimes what happens is when someone
21 is copying it, there may be elements that they're just not
22 attending to and it is a complex figure. It is a figure that
23 often when people are approaching it, there's a degree of
24 anxiety when they're trying to do the copy, there are so many
25 elements that they need to keep in mind. Sometimes then what

James - Cross/Cohen

1 happens is with a little bit of time, they're able to recall
2 some of the aspects that they didn't before.

3 Q Right. And it was the copy, his inability to copy that
4 you focused on in your -- I mean, when you talk about this
5 figure, you talked about his inability to copy in your report.
6 Correct?

7 A I talked about his difficulties in the way in which he
8 approached the task, the disorganization and the lack of a
9 structured organized approach in -- in the task.

10 Q All right. And in your report you say: "As noted on the
11 copy task of the Rey-Osterrieth Complex Figure, Mr. Wilson
12 demonstrated some difficulty in capturing the overarching,
13 organizing framework of the design." Correct?

14 A That's correct.

15 Q And that was on the copy. Right?

16 A That's correct.

17 Q And then on the immediate and the delayed, he did much
18 better. Right?

19 A That's correct.

20 Q So moving on to the last subtests, this is the last ones
21 that you did, there's one more page. The Wechsler Memory
22 Scale. And really on that we can look at the subtest.
23 Correct?

24 A That's right. So what we have there are the composite
25 scores, the indices, and then we have subtest scores which

James - Cross/Cohen

1 make up the indices.

2 Q And here we have scores in the low average range. Right?

3 A That's correct.

4 Q Logical memory, verbal paired associates, verbal paired
5 associates II. And in designs, he hit the borderline here?

6 A Yes. That would be significant impairment,
7 fifth percentile.

8 Q And then in the visual reproduction, he did quite well,
9 he did in the average there. Correct?

10 A Right. I think that's consistent with what I had just
11 said about the Rey.

12 Q And then in the spatial addition and the symbol span,
13 spatial addition he was in the borderline and the symbol span
14 he was in the low average. Right?

15 A Yes. That index stands out in terms of -- that's an
16 actual -- actually a visual working memory index, so working
17 memory has been a long standing issue. So that is the lowest.

18 Q Now, in the Wechsler individual achievement test this is
19 similar to the Woodcock-Johnson test. Correct?

20 A Yes, its the measure of achievement.

21 Q Right. And in this test, Mr. Wilson scored on -- on word
22 reading, which relate to language, right, he scored --

23 A Yes, it's a simple reading task.

24 Q He scored poorly on that. Right?

25 A Yes.

James - Cross/Cohen

1 Q He scored in the low average on the pseudoword decoding.
2 Right?

3 A That's not low average, that's the sixth percentile.
4 That's the borderline range.

5 Q Again, you're calling that, right, borderline? On our
6 chart we have low average but --

7 A A 77?

8 Q Around there. Okay. So we'll call that borderline.

9 A Okay.

10 Q And on the oral reading fluency, again, he's in the
11 borderline. In the reading comprehension, he's in the
12 borderline --

13 A Borderline.

14 Q -- low average range. And in the spelling he did very
15 poorly as well. Right?

16 A Yes, first percentile for age.

17 Q Okay. All right. And that's very low.

18 And, again, these all are related to language.
19 Correct?

20 A Well, they are related. They're reading related skills
21 and reading and written language skills.

22 Q Right. And then in the sentence composition, he actually
23 did a little bit better. Right?

24 A Yes, he did a little bit better.

25 Q And he was in the low average there, sentence composition

James - Cross/Cohen

1 and essay composition?

2 A That's correct.

3 Q And in the oral expression, he did 5 percent?

4 A Yes, he was at the fifth percentile, very poor.

5 Q Yes. And then in the -- right. He had done a little bit

6 better -- I mean, the sentencing composition and essay

7 composition, they're lower, but they're low average. Right?

8 A Yes.

9 Q And then the numerical observations, again, he's in the
10 low average. Right?

11 A That's correct.

12 Q And then the math problem, fluency, we go to addition,
13 subtraction and multiplication, and he's in the low average on
14 those as well?

15 A No.

16 Q Multiplication is low average and addition is --

17 A Multiplication is a 78. That's the borderline range.

18 Q Borderline, okay.

19 A Addition is borderline range, and subtraction --

20 Q Subtraction is --

21 A -- significantly impaired.

22 Q Significantly impaired?

23 A Yeah. And we're talking about scores ranging from the
24 late second grade level to about the early seventh grade
25 level.

James - Cross/Cohen

1 Q All right. Now, when you put all these scores
2 together --

3 A Yes.

4 Q -- I've marked a document I've put together as
5 Government's Exhibit 96. And this has -- this puts all the
6 scores into either the average, low average, borderline and
7 intellectually disabled categories.

8 MS. COHEN: Now, this obviously -- Your Honor, we
9 offer this subject to counsel's approval, and I'd just use it
10 as a discussion basis. Then we can come to an agreement or
11 not on it, but I'd offer it at this time.

12 THE COURT: What is this?

13 MS. COHEN: This is all of the scores just put in
14 categories of what was average, low average, borderline and
15 intellectually disabled.

16 THE COURT: Have you shown it to the other side?

17 MS. COHEN: No, I have not.

18 MR. BURT: Again, your Honor, since I've just seen
19 this, I can't vouch to accuracy. But if she wants to use it,
20 subject to correction, I have no objection to that procedure.

21 THE COURT: All right. Government Exhibit 96 is
22 received into evidence, subject to the conditions set forth in
23 defense counsel's statement.

24 (Government's Exhibit 96 received in evidence.)

25 THE COURT: Go ahead.

James - Cross/Cohen

1 Q Doctor, some of the scores we discussed -- I use this
2 chart up here so some of these scores I called low average
3 that was about 78. You would put that in more of the
4 borderline range?

5 A That's correct.

6 Q Okay.

7 A According to when you look at something like the -- there
8 are other metrics, for example. The Wechsler scales have
9 different metrics when it comes to borderline. Borderline
10 falling in the 70s, yes.

11 Q So a few of these you would disagree in terms of exactly
12 what category we would put them in. Correct?

13 A That's correct. Yes.

14 Q And as I said, based on what this chart -- I put these
15 categories into either if it was a nine, or a -- scaled score
16 of seven or six, I put in the low average, borderline would be
17 four or five, and mild intellectually disabled would be two,
18 three, or one.

19 When you put all of the scores together -- now, this
20 one, the intrusion and perseverations, actually you were
21 saying I had them right, and actually the perseverations was
22 the one that was in the higher and the intrusions were in the
23 lower. But whether or not those would flip-flop, they would
24 be in the same count?

25 A That's correct.

James - Cross/Cohen

1 Q So we had 21 scores that were in the average or higher.
2 As you see, the 20 questions we talked about, the trail
3 making. And then in the low average we had 18 scores. And in
4 the borderline I had 15 scores. Again, give or take, there
5 could be a couple that you disagree with, in the 18 should be
6 in the 15. But from using that chart, we had 15 in the
7 borderline and we had seven in the intellectually disabled.
8 Right?

9 A Mm-hmm.

10 Q According to this chart, that's about 12 percent of the
11 total scores that are in the intellectually disabled. Right?

12 A That's correct.

13 Q And when you look at a chart or a -- I put this in a
14 piechart of those scores, and this is Government's Exhibit 97.

15 MS. COHEN: Again, this would be the same subject to
16 counsel's review and we can -- we'll put this in through one
17 of our experts as well, so it would be subject to connection.

18 THE COURT: All right. Thank you.

19 Q And in this piechart, the majority, you would agree, of
20 scores --

21 MS. COHEN: Oh, I'm sorry, your Honor. Because it's
22 subject to connection, may I show it?

23 THE COURT: Yeah, same basic approach as the last
24 exhibit, Exhibit 96. Correct?

25 MR. BURT: Correct.

James - Cross/Cohen

1 THE COURT: Okay. 97 is received in evidence
2 subject to review by counsel as to its accuracy.

3 (Government's Exhibit 97 received in evidence.)

4 THE COURT: Go ahead.

5 Q Okay. So looking at Government Exhibit 97, you'd agree
6 that the majority of the scores are not in the intellectually
7 disabled area, but in fact the majority are in the average and
8 low average? Correct?

9 A That's correct, but I actually have a real problem with
10 how this is organized.

11 Q Well, just using --

12 A In part, because, again, you can't use scaled scores or T
13 scores or standard scores to infer a global diagnosis like
14 intellectual disability. It's just not something that is done
15 in practice.

16 Secondly, it's no clinician would ever count scores
17 in this way and say there's this many in this range, this many
18 in this range. No clinician makes diagnostic decisions or
19 decisions about strengths and weaknesses of a
20 person's functioning based on counting. They really are
21 looking at an overall profile of strengths and weaknesses when
22 they're making diagnostic decisions.

23 And there are some scores that count more than
24 others in the sense that there are some scores that really are
25 more demonstrative of generalized problems than others. So in

James - Cross/Cohen

1 some ways some scores have more weight. In this way, what
2 you're doing is you're giving every single score equal weight.
3 But in reality that's not what happens in a clinical
4 situation.

5 Q Okay. But just based on numbers, what these scores show,
6 the majority of them are not intellectually disabled scaled
7 score, whether or not you agree with how it's done, that's
8 what this chart shows. Right?

9 A Yes, but its not a valid analysis of scores is what I'm
10 saying.

11 Q And you're basing most of your knowledge on these
12 achievement scores. Correct?

13 A Well, they're not all achievement scores, number one.
14 They're achievement -- or achievement only refers to the
15 academics?

16 Q These neuropsychological testing scores.

17 A Yes. So that -- that cover a broad range of areas,
18 including executive functioning, executive functioning
19 achievement, memory, etc. So that's what -- that's the point
20 that I'm making is that deficits in -- strengths in some of
21 these scores are not as meaningful as deficits in other.

22 Q Okay. So you're basing your opinion on
23 neuropsychological testing you did, right, as well as the IQ
24 test scores that a few people -- a few others have done as
25 well? Correct?

James - Cross/Cohen

1 A My entire opinion?

2 Q Because you didn't do your own IQ testing. Correct?

3 A That's correct. So my opinion is based on the review of
4 the historical data, the review of the medical records and
5 educational records and other testing records that I took a
6 look at, as well as my neuropsychological testing.

7 Q And you base part of your opinion on this
8 neuropsychological testing. Correct?

9 A That's correct.

10 MS. COHEN: No further questions. Your Honor.

11 THE COURT: About how much do you have on your
12 redirect?

13 MR. BURT: I think it's still true about an hour
14 maximum.

15 THE COURT: All right, let's take a ten-minute break
16 then.

17 (Recess.)

18 THE COURT: All right, redirect.

19 Be seated, everybody.

20 REDIRECT EXAMINATION

21 BY MR. BURT:

22 Q Dr. James, you were asked a lot of questions about your
23 scoring and the various tests that were given. Correct?

24 A That's correct.

25 Q Okay. And one of the things you said in your report,

James - Redirect/Burt

1 which is in evidence, is -- at GOV10935 in your report, it's
2 the paragraph that's entitled "Overview of Mr. Wilson's
3 Intellectual Functioning." Do you recall that paragraph?

4 A Yes, I do.

5 Q In that first paragraph you wrote: "Mr. Wilson, like all
6 people, have strengths as well as deficits. In fact, research
7 has shown (i.e. Pulsifer, 1996) that with the exception of
8 profound mental retardation, cognitive impairment rarely
9 consists of uniform deficits in all areas of functioning, but
10 is rather manifested as a profile of relative strengths and
11 weaknesses which together compromise overall cognitive
12 functioning."

13 Did you write that in your report?

14 A Yes, I did.

15 Q And what was the reference, the Pulsifer reference?

16 A Let me just refer to that. Can I have the page number
17 again?

18 Q Yeah, it's 10935, GOV10935?

19 A Right. It's been my experience as well that individuals
20 with intellectual disability have a profile cognitive of
21 strengths and weaknesses as seen in my neurological testing.
22 So the importance, though, is the further analysis of where
23 those strengths and weaknesses lie; that is to say, the
24 strengths tend to be in areas that are not as important for
25 day-to-day living as the weaknesses. The weaknesses are

James - Redirect/Burt

1 further and broader reaching and more impactful of one's
2 ability to conduct themselves in daily life.

3 Q Now, when Dr. Shapiro was here, he identified one of the
4 slides which is on the screen now, slide 27 from Exhibit A,
5 and I want to direct your attention to the last item he's got:
6 "People with mild manner retardation can have a very up and
7 down IQ/adaptive behavior profile."

8 Is he saying something different than what you said
9 in that sentence that I just read to you?

10 A No, that's very consistent.

11 Q And so can you look at an IQ profile or a
12 neuropsychological profile or an academic achievement profile
13 and say that there is any one pattern other than that there
14 are strengths and weaknesses?

15 A No. There is not -- as cognitive, no consistent pattern.

16 Q Now, a lot of time was spent with the Dr. Kaufman book
17 and getting you to agree that the research has shown that if
18 you have a performance greater than verbal IQ profile, an up
19 and down sort of performance greater than verbal, that that is
20 diagnostic of a learning disability.

21 Do you recall all those questions?

22 A Yes, I do.

23 Q All right. Is it true, then, that the book that was
24 reference, that what Dr. Kaufman does is he sort of reviews
25 the research for various instruments and then he concludes

James - Redirect/Burt

1 with a summary of what the research -- the implications of the
2 research are?

3 A That is correct.

4 Q And turn, if you would, to Exhibit B, which is in front
5 of you, that's the literature binder, and in the section where
6 the Kaufman book is reprinted.

7 A Yes.

8 Q At the very end of his discussion of learning
9 disabilities after reviewing all of the literature showing
10 various profiles for learning disabilities, does he end his
11 discussion with a paragraph -- which is at the very last
12 paragraph before a new topic which is "Delinquency in
13 Psychopathic Behavior"?

14 A May I have the page reference?

15 Q Yeah, 327.

16 THE COURT: I'm sorry.

17 MR. BURT: Page 327.

18 A Yes.

19 Q Okay. And the sentence, the last paragraph in that
20 discussion of learning disabilities begins with words,
21 "Although some..." Do you see that?

22 A Although some, yes, I do see that.

23 Q Read that paragraph and then tell us what it means.

24 A Sure. "Although some of the profile patterns are
25 reported fairly consistently for adolescents and adults with

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1 learning disabilities, these patterns are not powerful enough
2 to make a differential diagnosis. All of the previous
3 discussions have been on group data, but clinical
4 interpretation requires analysis of individual data which are
5 more unstable than group means. Thus, the profile, such as
6 scald, ban times, categories or the four factor indexes may
7 provide useful information about an individual's cognitive
8 abilities on a case-by-case basis, but the profiles themselves
9 cannot be used to justifies making a diagnosis of learning
10 disability.

11 "Similarly, a P greater than V profile cannot
12 provide evidence of a learning disability in and of itself. A
13 combination of many factors such as performance on
14 standardized measures of achievement, academic history,
15 developmental history, medical history, family history, and
16 behavioral observations must be used to properly evaluate
17 learning disabilities."

18 Q Okay. So what is he saying there? He mentions various
19 kinds of comparisons, right? Something called s-c-a-l-d
20 comparisons?

21 A That is correct.

22 Q What is that?

23 A There are different types of profiles that people have
24 researched in IQ scores with certain scores -- the -- that
25 acronym stands for, I believe, different -- I'm not familiar

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1 with that particular profile but I do know that aspects of the
2 profile stand for different subtests on IQ tests. And so
3 there have been profiles in IQ scores that have been
4 researched, but none of those profiles are diagnostic in and
5 of themselves.

6 Q And he includes within that discussion the performance
7 greater than verbal profile that counsel was focusing your
8 attention on?

9 A That is correct.

10 Q And is it true that although researchers would like to
11 see a profile because it would make it easier to do a
12 diagnosis, that so far we just don't have a pattern or profile
13 in IQ scores that would let us say, aha, we have a learning
14 disability here?

15 A That's correct. And that's consisted with my clinical
16 practice. I see a lot of individuals with learning
17 disabilities and they have various types of IQ profiles. It's
18 really important for me to be able to consider other
19 information, including their achievement scores, their
20 performance on other measurements, neuropsychological
21 functioning, to provide an overall picture in order to make an
22 accurate diagnosis.

23 Q Now, some similar questions were asked about his section,
24 Dr. Kaufman's section on what he calls mental retardation.
25 Correct?

James - Redirect/Burt

1 A That is correct.

2 Q And your attention was focused on a particular part of
3 the chapter which deals with some studies that were done on
4 the WAIS and WAIS-R IQ profiles?

5 A That is correct.

6 Q And that's at page 334, correct, of that same
7 publication?

8 A Yes, I see that page.

9 Q And under the heading "WAIS and WAIS-R IQ Profiles," if
10 you turn to the next page, that's the study that counsel was
11 focusing on, right, the 863 individuals?

12 A Yes, that's correct.

13 Q And she was focusing on that study to say in that
14 particular study there was a P greater than V profile. Right?

15 A That's correct.

16 Q But if you go back to 334, what does the first sentence
17 of the discussion under WAIS and WAIS-R IQ profile say?

18 A It says: "The Data available on the characteristic WAIS
19 or WAIS-R profile individuals who are mentally retarded do not
20 yield a consistent VP profile."

21 Q And what does the second sentence say?

22 A "Several studies support a P greater than V profile in
23 developmentally disabled populations, but there are also --
24 there are also those which support a V greater than P
25 profile."

James - Redirect/Burt

1 Q So the study go both ways in terms of how the profiles
2 would look?

3 A That is correct.

4 Q And you're not cherrypicking the studies that say that
5 the performance greater than verbal profile can be used to
6 diagnose mental retardation in this case, are you?

7 A No, I'm not.

8 Q Because we just don't have a profile?

9 A There is no consistent profile.

10 Q And then at page 336, this is, again, at the very end of
11 his discussion of all the studies, he's got a heading called
12 "Clinical Implications of Findings on Individuals with Mental
13 Retardation." Do you see that?

14 A Yes, I do.

15 Q And in the second column there, there is a sentence which
16 begins, "The research on IQ..." Do you see that?

17 A Yes, I see that.

18 Q Read that sentence.

19 A "The research on IQ, specifically Wechsler IQ, has
20 indicated that there is not one simple pattern of performance
21 on IQ tests that is consistent across individuals with mental
22 retardation."

23 Q All right. So, again, is there any way you can say that
24 your conclusion that Mr. Wilson is intellectually disabled is
25 contradicted by the fact that he has a consistent performance

James - Redirect/Burt

1 greater than verbal profile across most of these tests.

2 Right?

3 A Right, exactly. Yeah, there is no profile.

4 Q All right. And I think you were also asked some
5 questions about your neuropsychological testing. Correct?

6 A That's correct.

7 Q Now, just in terms of terminology, you reference
8 achievement tests and that's different than neuropsychological
9 tests. Correct?

10 A That's correct. Achievement tests are one domain in
11 which a neuropsychologist might be interested in assessing.

12 Q And achievement tests define those in relation to
13 neuropsychological tests?

14 A Achievement tests refer specifically to tests of academic
15 functioning; that is to say, reading, spelling, math,
16 calculations, reading comprehension.

17 Q And in terms of your own testing, did you do both
18 neuropsychological testing and achievement testing?

19 A Yes, I did 3.

20 Q And was one of the purposes of the achievement testing to
21 ascertain whether Mr. Wilson only suffered from a learning
22 disability?

23 A That's correct.

24 Q And the results of your achievement tests are listed at
25 page 10954 of your report?

James - Redirect/Burt

1 A Yes, that's correct.

2 Q You have there grade equivalency. Correct?

3 A Yes, I do.

4 Q And I assume that -- how old was he when you administered
5 your test?

6 A He was 29 when I first administered the test, and then he
7 turned 30.

8 Q All right. And at that time his grade equivalency, was
9 it fairly consistent across all the domains you were measuring
10 for academic achievement?

11 A His grade equivalence ranged from the late second grade
12 level for reading comprehension to the early seventh grade
13 level for a symbol timed single digit addition task with most
14 of his scores following in that range, third grade,
15 fourth grade, fifth grade level of performance.

16 Q And I think you said on direct examination that -- maybe
17 it was on cross -- that one of the things you look at when
18 you're trying to diagnose a learning disability is the
19 disparity between the IQ score and the achievement scores?

20 A That's correct. The definition of a learning disability
21 is really looking at specific, unexpected deficits in
22 achievement without broader deficits in intellectual or
23 adaptive functioning.

24 Q And you had not only your own achievement testing but
25 historical achievement tests that had been given in connection

James - Redirect/Burt

1 with Mr. Wilson special education classes from grade first or
2 second all the way through the seventh grade?

3 A Yes. Mr. Wilson's academic achievement has been tested
4 multiple times.

5 Q And did that academic achievement indicate to you a
6 learning disability only or did it indicate something else?

7 A Well, no, it indicated a broader -- a broader deficit in
8 conceptual areas. For example, not only does he have
9 long-standing deficits in actual academic achievement, that is
10 to say, consistently over time scores that in elementary
11 school level, even as an adult, in the second -- like I said,
12 the second to early seventh grade level. But he also, in the
13 historical material that I reviewed, demonstrated broader, for
14 example, functional academic deficits. So at the age of nine
15 he was unable to read a clock. At the age of 14, he had
16 difficulty following a simple recipe, difficulty using liquid
17 and dry measurements.

18 There were conceptual difficulties that were related
19 to his academic skills that were described as broader, for
20 example, in at 14 looking at reading, for example, his reading
21 was poor, but in addition, there are comments in his IEP that
22 he is not able to understand the significance of the character
23 in the story or relationships, concepts in science, for
24 example, between work and energy or the independence of
25 nations in social studies. So broader conceptual difficulties

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1 that went beyond just the surface academic difficulties.

2 Q And would you say, based on the historical achievement
3 scores and your own achievement scores that he has both a
4 learning disorder and intellectual disability, or is it just
5 one?

6 A I think that he has both.

7 Q Okay. And is it impossible to diagnose both in a single
8 individual?

9 A No. In fact, mental retardation or intellectual -- the
10 diagnosis of intellectual disability is one of the few
11 diagnoses in the DSM that is not a diagnosis of exclusion;
12 that is to say, where a diagnosis of a learning disability
13 excludes other kinds of problems. If one is diagnosed with
14 mental retardation they can also be diagnosed with a learning
15 disability as well. Or a mood disorder or other disorders.

16 Q Is that something you see in your clinical practice, that
17 is a dual diagnosis, children or adolescents who both have a
18 learning disability and who are intellectually disabled?

19 A Yes. Again, the learning disability in someone with an
20 intellectual disability is not unexpected because they have
21 broader deficits across other domains.

22 Q And is it an issue that has been studied, in terms of
23 trying to sort out whether someone just has learning
24 disabilities and just has poor -- or just has intellectual
25 disabilities or both?

James - Redirect/Burt

1 A Yes, it has been -- it has been studied.

2 (Continued on the next page.)

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James - Redirect/Burt

1 Q Now, there were -- each of your neuropsychological tests
2 counsel went through and there were a couple where you had
3 some comments and she said, "Bring it up on redirect
4 examination." So if you don't mind I'd like to ask you about
5 those.

6 You were going to make a comment on the Trail Making
7 Test about a discrepancy you found in and the significance of
8 it?

9 A Yes. That's correct.

10 Q Could you tell me what you were going to say.

11 A So I think its important when you look at these scores to
12 look at relative strengths and weaknesses particularly within
13 a measure.

14 So trail making is about -- has various subtests.
15 One, where you just are looking at an array of threes and
16 youre crossing them out and visually scanning them. Its just,
17 you know, are you able to scan the page?

18 Then the Number Sequencing Task has numbers in
19 various order, two pages, and you have to use a pencil and
20 paper to sequence the numbers in order starting with one, all
21 the way to 15, I believe, and its a timed task.

22 Similarly, with letter sequencing, you are starting
23 out with letters which goes from A to P. Its a
24 pencil-and-paper task where youre sequencing and letters in
25 order and its timed.

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1 Now, the way that these tasks works is that all of
2 those tasks are done before so that you can potentially
3 interpret and rule out problems with the next task, which is
4 the real core task of trail making, and that is the one this
5 Mr. Wilson did poorly on.

6 Number-letter switching involves going back and
7 forth between letters and numbers. So it's important to look
8 at that in the analysis because the fact that he did well on
9 the first few allows you to rule out other problems that can
10 contribute to his performance on that test. For example, if
11 he had poor eyesight, he wouldnt be able to do the Visual
12 Scanning Test. Well, we know that's not the case because he
13 did well on that.

14 If he couldn't sequence letters, or didnt know his
15 numbers, well, we know that's not the case because he did well
16 on those two tasks. But the core task here is that switching
17 component and that's where the executive deficits come in, in
18 that the switching involves working memory. He has to hold
19 one sequence in mind, two sequences in mind at the same time
20 as he alternates between the two and its really about a task
21 of cognitive flexibility, moving back and forth between
22 letters and numbers, and working memory, holding where he is
23 in mind and not losing his place.

24 He's had longstanding deficits in working memory.
25 And working memory in real life is key to being able to learn

James - Redirect/Burt

1 effectively and to hold information in mind such as
2 instructions and follow through.

3 So the fact that he -- its not so much -- this is
4 what I'm trying to get at before -- its not so much what he
5 does well in and what he doesn't do well in, its the
6 importance of the things that he doesn't do well in. In terms
7 of the load and complexity of those tests and what that might
8 mean for him in terms of daily functioning.

9 Q And youre indicating that goes to executive functioning,
10 the deficit in executive functions?

11 A Exactly. Exactly. Being able to follow instructions,
12 hold them in mind. If you were planning on going to, you
13 know, taking the subway and needed to switch trains and you
14 needed to, you know, make different plans, if you encountered
15 some trouble on one train that wasnt working, you have to
16 switch to another, you have to hold all this information in
17 mind and use that information to guide your behavior and
18 deficits in working memory contribute to that. Difficulties
19 in that area.

20 Q Now, is what you just said contradicted by his average
21 performance on the Wisconsin Card Sorting Test?

22 A No, that's a different task altogether.

23 Q And what you said -- these different tests have different
24 weights. What weight do you put on the score on the Wisconsin
25 Card Sorting Test in doing your analysis?

James - Redirect/Burt

1 A So, the Wisconsin, it is about identifying an underlying
2 rule or context. But it is a low-load task.

3 What I discovered was that Mr. Wilson had troubles
4 with tasks where there were more than one element when he was
5 asked to do more than one thing at a time. But with the
6 Wisconsin, it is a low-load task in that you're getting
7 specific feedback about your performance right or wrong and
8 once you figure it out, and you figure out the matching
9 principle of the task, then there isn't anything more to figure
10 out then you're done.

11 So he was able to use the very simple feedback that
12 I gave him and structure what I gave him in order to solve the
13 task. And then once he solved it, it's no longer novel.
14 That's in contrast to some other tasks that I did where he had
15 significant difficulty generating an appropriate strategy and
16 would get stuck when he couldn't do it. He just kept trying
17 the same thing over and over and over and over again, like,
18 with the sorting recognition. He couldn't figure out how I
19 sorted the cards and he can he kept on sorting them in the
20 same way; or in The Tower Test, where he couldn't figure out
21 how to complete the tower in the appropriate number of moves
22 and just kept on going in the task without really being able
23 to figure out how to be efficient.

24 Q Okay.

25 Now, for the 20 Questions Test, there was a comment

James - Redirect/Burt

1 or an analysis you wanted to add and counsel said, "Bring it
2 up on redirect."

3 You said there was something remarkable, and I think
4 she said, "I heard enough."

5 So what were you going to say?

6 A Yes even though he did well on task, and the scores are
7 in the average to average range, what we often do as
8 neuropsychologists we look beyond the scores and we look --
9 sometimes the scores, unfortunately, don't always capture the
10 way in which a person approached the task and sometimes that
11 could be important.

12 In this situation, yes, he was able to achieve
13 average to high average scores on the key scores that are
14 given as prior 20 questions. So part of the task is initially
15 to be able to eliminate as many of the options. Its
16 literally, Ill describe the task, its literally the game "20
17 Questions" where you have a page that has about 40 different
18 pictures on it, small pictures -- animals, modes of
19 transportation, they're in different colors. And the task is
20 to, in as few questions as possible, figure out the picture
21 that the examiner has chosen or has been asked to choose given
22 the instructions.

23 When I noticed that Mr. Wilson did was he used the
24 same approach every time. So even though his first question
25 was, "Is it an animal?" which was able to eliminate some of

James - Redirect/Burt

1 the items on the page, he kept using the same approach every
2 time which doesn't really make sense given that there has to
3 be other ways to eliminate some of the items on the page. It
4 just seemed like he found a particular kind of strategy and
5 stuck with it and sometimes that works for him and sometimes
6 it does not.

7 Q And, again, is this diagnostic in and of itself, or is it
8 just one factor that goes into your analysis of intellectual
9 ability?

10 A Its one factor that goes into my analysis thinking about
11 one's ability to generate alternatives and strategize when one
12 alternative has failed.

13 Q On the tower tasks, you were asked whether people who are
14 impulsive have difficulty and I think you wanted to make some
15 comment about your assessment of his impulsiveness when you
16 gave the test.

17 A Yes. It is true that people who are impulsive can do
18 poorly on The Tower Test but I didn't notice, and I didn't in
19 my report, report any kind of concern with impulsive at this
20 and Mr. Wilson's performance across any of the measures. In
21 fact, the opposite really was the case where he often
22 double-checked his work. He approached tasks methodically and
23 earnestly. There wasnt any indication in my testing of
24 impulsivity.

25 Q All right.

James - Redirect/Burt

1 Returning for a moment to your learning
2 disability -- the questions about learning disability.

3 Did you, in your PowerPoint, Slide 23, include a
4 slide that is relevant to determining whether we're just
5 talking about a learning disability here?

6 A Yes, I did.

7 Q And could you explain this slide, please --

8 A Sure.

9 Q -- this is Slide 23?

10 A This is a slide looking at individuals with various types
11 of diagnoses in comparisons. So we have children who are
12 typically achieving as well as children with reading
13 disorders, ADHD, and a combination of reading disorders and
14 ADHD.

15 And what we're looking at is their performance in
16 different types of domains. You could say neuropsychological
17 domains, procedural learning, concept formation, phonological
18 awareness, vocabulary, visual motor skills. And, for each
19 diagnosis, what you see is a different pattern of performance.

20 And so, for example, someone with a reading stored
21 is going to have more difficulty with vocabulary; someone with
22 ADHD might have more difficulty in another area in sustained
23 attention, for example. But what we see is that overall, that
24 individuals with these disorders are actually across the board
25 falling below the individuals with typical development.

James - Redirect/Burt

1 So that is to say and I believe the -- there was
2 nobody that was included that was actually had an I.Q. lower
3 than 81, so I think it really demonstrates you could have
4 these up and down profiles. But, overall, what you see are
5 deficits across the board, and that's what we see with
6 individuals with intellectual disability, we see deficits
7 across the board.

8 Q And "deficits across the board," does that mean that
9 uniform deficits? I'm a little confused on what you said
10 before strengths before weaknesses?

11 A Relative strengths and relative weaknesses. So what we
12 see is all of these individuals with disorders have
13 performance below the typically developing individuals, but we
14 still see profiles of strengths and weaknesses among them.

15 Q And that would include intellectual disability?

16 A That's correct.

17 Q Okay.

18 Now, you were also -- at one point, you were asked a
19 question about the cultural influence on the scoring of the
20 I.Q.

21 Do you remember that question?

22 A Yes, I do.

23 Q And at 1249 you were asked, "Doesn't the information
24 subtest, can't that depend on environment?"

25 And you said, "Yes, it can."

James - Redirect/Burt

1 A Yes.

2 Q Then you were asked a question, "I mean, if youre in an
3 environment where people aren't talking about Cleopatra and
4 continents and things like that you wouldnt pick it up,
5 correct?"

6 And you said, "That is correct."

7 A Yes.

8 Q Are these tests, these I.Q. tests, normed on
9 African-American populations?

10 A Yes, they are. They're normed on -- when they're
11 initially normed, they're normed on individuals across the
12 country from different regions from different ethnic
13 backgrounds from different socioeconomic backgrounds. That is
14 part of the norming process.

15 Q So this question -- she was referencing here a question
16 on the instrument, right, about who was Cleopatra?

17 A Yes.

18 Q And the question, "If youre in an environment where
19 people aren't talking about Cleopatra," is there an assumption
20 that there is an environment here he's not going to do well
21 because he's in some sort of environment because of race or
22 culture they're not going to be talking about Cleopatra, and
23 if that is the implication, is that true in terms of how these
24 tests are used?

25 A No. I mean, there is a -- like I said, there is -- the

James - Redirect/Burt

1 norming is conducted on individuals across the country of
2 different ethnic backgrounds and races, so that is taken into
3 account in terms of performance in the broader performance on
4 niece tasks.

5 There is influence of, you know, environment in
6 information but there is also other factors. Simply, one of
7 the things I see in individuals with intellectual disability
8 is they have trouble on information because they're just
9 simply not able to pick up without structure and help the kind
10 of factual knowledge about the world that other people do.

11 Q Are you aware of the discussion in the Green Book that
12 says you do not discount scores because of race. In other
13 words, you don't say, well, he got a 75 but that's because
14 he's black.

15 A Yes, I'm aware of that.

16 Q All right.

17 And do you generally, when you get an I.Q. score,
18 discount it or somehow dismiss it because of cultural or
19 racial considerations?

20 A No.

21 Q Is that protocol anywhere that you know of?

22 A No.

23 Q Now, you were asked some questions about this chart;
24 correct?

25 A Yes, I was.

James - Redirect/Burt

1 Q And as I understood --

2 THE COURT: Please identify it for the record.

3 MR. BURT: This chart being 99-A.

4 THE COURT: Thank you.

5 MR. BURT: Thank you, your Honor.

6 Q And this sets forth -- this is the modified chart which
7 sets forth the various scores that people gave to Mr. Wilson
8 on the subtests; correct?

9 A That's correct.

10 Q And then you were asked to compare those scores to this
11 chart over here, which is Exhibit 98; right?

12 A That's correct.

13 Q And it was represented this morning that that chart was
14 taken from the WAIS-IV manual?

15 A That's correct.

16 Q Specifically, at Page 126, which I think is open in front
17 of you there. Do you see it? It's the large binder which is
18 L?

19 A Yes.

20 Q If you can get it that?

21 A Yes I see this.

22 Q And, first of all, the WAIS-IV, all of these scores up
23 there are not WAIS-IV scores, are they, except Dr. Denney's?

24 A That's correct.

25 Q They're WISC-R, WISC-III or WAIS-III?

James - Redirect/Burt

1 A That's correct.

2 Q So she's using a chart which is taken from the WAIS-IV
3 manual; correct?

4 A That's correct.

5 Q Okay.

6 And the manual says, on this page, and its got the
7 same chart she's got in terms of scores and what they
8 describe; right?

9 A That's correct.

10 Q And it says, "The composite scores are often described in
11 qualitative terms according to the examinee's level of
12 performance. Descriptive classifications provide qualitative
13 terms that characterize the examinee's level of composite
14 score performance relative to same-age peers.

15 And then it gives an example, "Test results can be
16 described in a manner similar to the following example
17 relative to examiner's of comparable age. This individual is
18 currently functioning within the," and then it lists a blank,
19 "range of intelligence on a standardized measure of
20 intellectual ability."

21 Right?

22 A Yes, that's correct.

23 Q And then if you turn to Page 124, which is the page
24 before, it defines what composite scores mean, does it not?

25 A Yes, it does.

James - Redirect/Burt

1 Q And it says, "Composite scores i.e. BCI, PRI, WMI, PCI
2 and FSIQ are standard scores based on various sums of subtest
3 scale scores; right?

4 A That's correct.

5 Q Is what the manual is saying here is you can use this
6 chart to interpret composite scores?

7 A Yes.

8 Q Composite scores are not the same thing as the subtest
9 scores, are they?

10 A That's correct. The subtest scores are the scaled
11 scores.

12 Q So can you do what was being done on cross, here take
13 these subtest scores and say, well, you got a certain score on
14 a certain subtest and, therefore, we can plug that into an
15 intellectual disability chart like we have here?

16 A No, you can't do that. The descriptive classifications
17 are based on composite scores, not on scaled scores. So the
18 scaled scores can provide information.

19 Its a level of analysis that can provide information
20 about the person's functioning when you, you know, look at
21 that information and any other information that you might have
22 about the person. But you can't infer a composite score or a
23 descriptive classification from a scaled score.

24 Q Now, in his book, at 454, Dr. Kaufman says, and Ill ask
25 you if you agree with this, "Never infer a behavioral or

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1 background hypothesis about a person based simply on a
2 grouping of subtest scores.

3 A Yes, I agree with that.

4 Q He says one should neither hypothesize distractibility
5 because of low scores on a digit span, arithmetic, and
6 letter-number sequencing, nor suggest a poor early environment
7 because of deficits in information and vocabulary.

8 Behavioral hypotheses requiring external support
9 from the clinician's observations of test behavior, from
10 behavioral rating scales filled out by others and so forth.
11 Background hypothesis demand reliable verification about the
12 individual's environment as a child, adolescent, and adult."

13 A That's correct.

14 Q Okay.

15 So, based on that, can you just simply take these
16 individual subtest scores and do a count of them and say,
17 well, he got above average in a certain number of them, below
18 average in others; and, therefore, he's not intellectually
19 deficient?

20 A No. No clinician would ever do that.

21 Q Can you use a similar analysis like she did in the last
22 pie chart. She marked, based on your neuropsychological
23 tests, where you do sort of a nose count and then say, well,
24 he only had seven in the intellectually deficient range and
25 just doing a score tab he's not intellectually deficient?

James - Redirect/Burt

1 A No, you can't do that. It reduces the scores -- it
2 reduces the interpretation to an actuarial one and its really
3 about the profile. And part of being a neuropsychologist is
4 knowing what these tests mean and what these patterns mean and
5 what better or worse performance on these tests mean.

6 Q Let me see if I can turn it around and see if you think
7 it would be a valid use of these subtest scores, okay?

8 Of all these subtest scores, does Kaufman rank them
9 according to what's called G, G loading?

10 A Yes, the general mental ability. So how these subtest
11 scores relate to the overarching concepts of general mental
12 ability which I.Q. tests attempt to imperfectly assess.

13 Q All right.

14 Just as an aside. You were asked a question, "Isnt
15 it true that I.Q. is the best measure that we have of I.Q.?"
16 which sound aid little circular.

17 Did you mean I.Q. -- or what did you mean by that?

18 A An I.Q. test is the best estimate that we have of the
19 concept of intelligence. Its an imperfect test but its the
20 best estimate that we have.

21 Q Best estimate of the concept of intelligence, not the
22 best estimate of a I.Q. score?

23 A That's correct.

24 Q An I.Q. score is not the best estimate?

25 A Of an I.Q. score.

James - Redirect/Burt

1 Q You referenced on cross-examination something you called
2 G; right?

3 A Yes.

4 Q And going to your slides here, we're not going to go into
5 too much detail because I'm not sure I could ever understand
6 it in a million years.

7 Is G -- am I correct that the term "G" is used in
8 your language to refer to general intellectual functioning?

9 A Yes, its a general mental ability. Its the construct,
10 its the underlying concept of intelligence that we are trying
11 to assess.

12 Q All right.

13 And is it made up of subparts that are listed here
14 on your diagram on Page 6.

15 A Yes, this is the schematic of the Cattell-Horn-Carroll
16 Model of Intelligence which is the -- I would say the model
17 that has the most research support and is best accepted at
18 this point in the field in terms of modeling the intelligence
19 construct.

20 So G is at the apex, which is the ultimate that
21 we're trying to measure. And then we have this second stratum
22 of abilities, for example, quantitative reasoning, auditory
23 processing, visual skills, crystallized intelligence which
24 really represents more factual knowledge. Processing speeds,
25 short term and long-term memory, et cetera.

James - Redirect/Burt

1 So that's that second level at which many of the
2 neuropsychological instruments get to. So things that I
3 measured, like, working memory, for example.

4 Q And as youre measuring these with your neuropsychological
5 tests, what are the testing results telling you in terms of
6 whether he has deficits in the underlying domains here that
7 make up G?

8 A What I saw in my testing were deficits in a number of
9 these areas. So, for example, you know, Mr. Wilson has had
10 long-term deficits in reading and writing. He's had long-term
11 deficits in aspects of short term memory and that was evident
12 on my testing.

13 In aspects of cognitive processing speed, on tasks
14 that I did that were timed, for example, The Tower Task where
15 he was very slow at quantitative knowledge. In terms of some
16 of his mathematic and arithmetic skills. Crystallized
17 intelligence in terms of his knowledge and factual knowledge
18 about the world. Many of these areas are compromised for him.

19 Q And when you were asked about clinical judgment, are you
20 using your clinical judgment in determining whether he has a
21 deficit in G, or in intellectual functioning, the first prong
22 of the Atkins Test?

23 A Yes.

24 Q And does an arbitrary number on an I.Q. score tell you
25 the whole picture in terms of you using your clinical judgment

James - Redirect/Burt

1 to determine whether he's deficient, or do you have to look at
2 your own testing and other things, et cetera?

3 A Yes. When I look to the definition in the AAIDD manual
4 that is saying its approximately two standard deviations below
5 the mean. So, approximately, I think its there for a reason
6 because I think that allows for the fact that it isnt a
7 cut-off. It isnt a fixed cut-off number.

8 For example, if you look at an IQ score of 75,
9 that's 1.67 standard deviations below means. 1.7 standard
10 deviations below the means. Its a really, really low score.

11 So it's the use of -- its taking a look at the set
12 of scores and then using considering the problems that may be
13 with those scores in terms of factors we talked about,
14 test/retest reliability, practice effects, examinee and
15 examiner conditions. Using clinical judgment and then saying,
16 okay, look at my neuropsychological testing showing broader
17 deficits this is going to help me make this decision.

18 Q Okay, back to this chart.

19 Does Kaufman in his book and other people rank these
20 subtests according to what is called "G loading"?

21 A Yes.

22 Q What does that mean?

23 A Its the extent to which the subtest taps into this
24 concept of general mental ability concept that we're
25 ultimately trying to assess.

James - Redirect/Burt

1 Q And what has the highest in its reference in terms of a
2 statistic?

3 A Yes, its referenced in terms of a statistic, so there is
4 a correlation. Its a correlation, I believe.

5 Q And we can go to a book like Kaufman's people and answer
6 the question: What is the G loading for a particular subtest?

7 A Yes, it can.

8 Q And what is the subtest that has the highest loading for
9 G?

10 A Vocabulary.

11 Q Vocabulary?

12 A Yes.

13 Q Okay.

14 So could I say -- and what's the lowest loading for
15 G?

16 A I believe the lowest loading is digit symbol coding,
17 although I'm not certain. I haven't looked at the G loadings
18 in order for a long time. I do know that vocabulary is
19 highest and block design is about six or seven down.

20 Q Okay.

21 So if I was going to turn around the argument that
22 was suggested to you on cross-examination and say, well, since
23 information is the highest indicator for G, and since he did
24 really extremely low when he was first tested in the
25 information category, I can use that standing alone to

James - Redirect/Burt

1 diagnose him with an intellectual disability would that be a
2 sound argument?

3 A No.

4 Q And why not?

5 A Because, again, youre looking at a subtest score. A
6 subtest score gives you information about a person's
7 performance. So vocabulary does have the highest loading on G
8 and its important to look at someone's vocabulary weaknesses
9 over time. But, again, you have other information that you
10 need to look at. You can't infer something diagnostically
11 from a single scaled score or even a set of scaled scores.

12 Q All right.

13 Now, you were asked a lot of questions about The
14 Practice Effect.

15 What do you know about what scores The Practice
16 Effect has an impact on and how great that impact could be in
17 the context of this case?

18 A Right. Well, I mean, any time that youre giving someone
19 a test that they've seen before. So any time after that first
20 administration, there is an element of The Practice Effect in
21 play.

22 So, The Practice Effect, the way I think about The
23 Practice Effect is that, you know, The Practice Effect is an
24 artificial inflation of scores because you now don't have the
25 kind of novelty that you did before. You are exposing someone

James - Redirect/Burt

1 to something that they've seen previously and whether or not
2 they're actually remembering the distinct items or the way in
3 which they're approaching the task. Any of those factors tend
4 to cause this inflation, this artificial inflation of scores
5 over time.

6 Q And what, in general, is being inflated? Is it the
7 verbal, the performance, the full I.Q. or all of the above?

8 A All of the above. The research that has been done and
9 it's intuitive in the sense that the types of The Practice
10 Effect is greater, an average I believe of about seven to
11 nine points, I.Q. points, for items on the performance scale
12 simply because those are items that in typical life someone is
13 not exposed to, so the novelty for those items wears off much
14 more quickly than items on the verbal scale which I think as
15 I've described you know them or you don't know them.

16 So, a vocabulary question, you know the answer or
17 you don't know the answer; you know the fact or you don't know
18 the fact. The average I.Q. gain on vocabulary is about three
19 points in terms of a practice effect. On the performance I
20 mentioned its about seven to nine, and overall its about five
21 to seven.

22 Q And is there a particular type of practice effect there
23 that is associated with having multiple test administrations?

24 A Yes. Kaufman describes the concept of progressive error.
25 And progressive error is about having it specifically related

James - Redirect/Burt

1 to someone being given an instrument multiple times over the
2 course of a number of years as we see in this case. We see in
3 this case an extraordinary number of times that Mr. Wilson was
4 administered a Wechsler instrument eight times in 15 years.

5 Q And in that situation, eight times in 15 years, do
6 practice effects become less or more when you keep
7 administering the tests? You were asked a question, well,
8 don't we have confidence in these scores because he was given
9 the test nine times and the scores keep clustering around a
10 certain number?

11 Isnt the repetition some indication that the scores
12 are reliable?

13 A No. Its, in fact, the opposite. The Practice Effect is
14 always there inflating scores. So what Dr. Kaufman says is
15 that in this special situation progressive errors. The more
16 times youre giving the tests, the more youre introducing error
17 on each administration. And it is particularly damaging to
18 the performance I.Q. scores which tend to be the most
19 inflated.

20 Q Now, I believe we had testimony from Mr. Giglio that he
21 though his score was invalid and you reviewed that in his
22 records; correct?

23 A That's correct.

24 Q His full-scale I.Q.

25 And you I believe you testified either on cross or

James - Redirect/Burt

1 direct that you thought it was not an invalid full-scale I.Q.;
2 correct?

3 A Correct.

4 Q Would you describe that?

5 A I was actually referring to -- so if you look at it
6 statistically it is, in fact, a large discrepancy. I was
7 talking about the difference between statistical and clinical
8 or practical significance.

9 I think the overall point is that his -- on his
10 administration, and I just need to check the number here, his
11 I.Q. score, that I.Q. score becomes very difficult to
12 interpret even with this discrepancy because its the sixth
13 time he's been given a Wechsler instrument, the fifth WISC
14 he's been given. And we know that with the operation of The
15 Practice Effect that that performance I.Q. is likely inflated,
16 which makes any kind of verbal performance discrepancy
17 analysis very difficult to do because we don't know how much
18 its been inflated.

19 Q So, bottom line, what do you conclude about that score?
20 Is it a valid full-scale I.Q.; not a valid full-scale I.Q., is
21 it an underestimate, is it an overestimate?

22 A Its a score that I can't put too much confidence in given
23 the problems with it.

24 Q Now, you were asked some questions about the notations in
25 Nagler's report about difficulties that Mr. Wilson was having.

James - Redirect/Burt

1 A Yes.

2 Q And you were asked whether, well, she was using her
3 clinical judgment and don't we have to trust that clinical
4 judgment; right?

5 A Yes.

6 Q Did she use her clinical judgment to say that because of
7 whatever difficulties were going on she could not report a
8 full-scale I.Q.

9 A No, she still reported a full-scale I.Q.

10 Q And what significance, if any, do you attach to that?

11 A She considered the full-scale I.Q. to be a valid one in
12 the sense that, physically, if you don't -- if you're not that
13 confident in the scores, you'll say that you can describe
14 difficulties that the person might have in performing on a
15 task.

16 Say that they're inattentive or fidgety or maybe not
17 as engaged as they should. But its been my experience that if
18 an examiner feels like the scores are actually invalid they
19 will say so, and she never said that her scores were invalid.
20 She had behavioral observations which contributed to her
21 analysis and understanding of Mr. Wilson and I think
22 particularly I think its enlightening the fact that she's
23 saying that as tasks became more difficult he became
24 frustrated, which is consistent with what we see in that he
25 was in someone with an intellectual disability. When they

James - Redirect/Burt

1 were easy he did fine, but he was when he was engaged and it
2 became more challenging, it was clear he couldn't do it then
3 he became frustrated and gave up. She doesn't say that scores
4 were invalid and reports a full scale.

5 Q So is the thrust of --

6 MR. BURT: The question he asked -- strike that.

7 Q When you see a notation like that, "Fidgeting around."

8 A Yes.

9 Q In general, would you agree that that might have a
10 tendency to produce a lower score?

11 A Yes. Yes. Certainly.

12 Q Now, at the same time that she's giving that test, he has
13 been given prior administrations; correct? So you talked
14 about The Practice Effect.

15 Would you expect The Practice Effect in that
16 administration to add points to the score?

17 A Yes. And that was the fourth administration of a
18 Wechsler instrument it was is third WISC-III and the one that
19 he had was just 13 months prior.

20 Q And so, as the The Practice Effect is adding points to
21 the score and the effort issue is subtracting them, what is
22 the overall effect of the score in terms of what youre going
23 it see the score do?

24 A Right.

25 Q And whether its going to hide The Practice Effect given

James - Redirect/Burt

1 that there are other variables at play?

2 A This is a good example of how a practice effect could be
3 offset. So we have potential variables that are suggesting
4 that the score might be an underestimate in terms of his
5 effort and then we have other factors that -- then we have The
6 Practice Effect.

7 So what we have here, I think, there is the
8 potential -- and we don't know exactly -- but there is the
9 potential that they are cancelling each other out, kind of
10 working against each other, and this is a situation where I
11 had described earlier that The Practice Effect is always
12 there, whether or not its always visible is the question, and
13 a practice effect can be diminished by other factors.

14 Q Last area.

15 You were asked about this Exhibit 96 which was sort
16 of the tally of your neuropsychological tests?

17 A That's correct.

18 Q And you said this is an invalid way of looking at it
19 because it doesn't consider the significance of the areas
20 where he had deficits?

21 A That's correct.

22 Q Would you walk us through how you analyzed this correctly
23 in terms of what weight you put on the deficits that he had
24 versus the strengths?

25 A Right.

James - Redirect/Burt

1 Q And how that supports or doesn't support your diagnosis
2 of intellectual disability?

3 A Right.

4 So, as I mentioned before, you have to look at some
5 of the discrepancies. In these tasks, for example, there are
6 easier tasks that are given earlier and there are more
7 difficult tasks given later where executive demands are
8 higher. The example that I had given was the Trail Making
9 Test where the initial tasks are quite simple sequencing
10 letters or sequencing numbers, but the real executive task is
11 the one that he performed poorly on where he had to alternate
12 between sequencing numbers and letters. There, with increased
13 cognitive load, increased demands on working memory his score
14 diminished significantly.

15 Another area that I would look at is if we're
16 looking at something like load in another way, for example,
17 The Tower Test. The Tower Test is a measure of, I would say,
18 it's an omnibus measure of executive functioning. You have to
19 do several things at the same time -- you have to plan your
20 strategy, you have to keep things in working memory, you have
21 to go quickly, you have to remember the rules and not violate
22 them. And on a task that loaded up executive functioning
23 demands, he performs poorly.

24 So when you look at -- and then any task that
25 involved working memory, holding information in mind, across

James - Redirect/Burt

1 the board he performed poorly. So again there was executive
2 functioning skills which I've described continue to develop
3 into your early 20s and are instrumental in you being able to
4 carry out everyday tasks, for example, like I said, finding
5 your way to a location or problem solving in a situation
6 where, you know, one of the examples that comes to mind from
7 Mr. Wilson that I had read about was going -- being asked to
8 go to the store to get a particular product, and when that
9 particular product wasn't available he came back with nothing.
10 I think some of these kinds of tasks relate to that, the
11 ability to strategize and think of an alternative when your
12 initial strategy fails.

13 Q And when you conclude, as you did in your report, that
14 Mr. Wilson is intellectually disabled, are you basing that on
15 a fixed cut-off score or a fixed result on any of your
16 neuropsychological tests?

17 A No, I'm not basing to on a fixed cut-off score. I'm
18 considering the whole series of scores and I'm also thinking
19 about the, as I mentioned, the strengths and limitations of
20 the tests, error factors that come into each of the scores,
21 and using clinical judgment.

22 MR. BURT: Thank you. That's all I have.

23 THE COURT: Anything else?

24 MS. COHEN: Just a few questions, your Honor.

25 RECROSS-EXAMINATION

James - Recross/Cohen

1 BY MS. COHEN:

2 Q Dr. James, you were just talking about Dr. Nagler's tests
3 and you mentioned that you attributed the frustrations in the
4 comments to Mr. Wilson's -- statements in the comments to
5 Mr. Wilson's frustrations on the actual tests; correct?

6 A She comments that as the tasks became more difficult he
7 became frustrated.

8 Q Right.

9 And, on redirect, you talked about the fact that
10 that frustration, right, on the tests shows, basically, the
11 frustrations tied to the tests and not necessarily to a lack
12 of effort; is that right?

13 A I said that, yes, that he can be -- that frustration, one
14 of the reasons that someone can be frustrated is because
15 they're having difficulty.

16 Q But isn't it true, Dr. James, that when Mr. Wilson walked
17 into this test from the get-go he was not interested; correct?

18 A You have to point me to where she specifically says that.
19 I don't think she says that. She makes comments about his
20 behavioral observations.

21 Q Now, go to GOV003942.

22 A (Complying). Can you give me the number again.

23 Q Yes. GOV003942, please.

24 A (Complying). Yes.

25 Q Mr. Nagler says in the second sentence under "Behavioral

James - Recross/Cohen

1 Observations." Upon being introduced to the examiner, to the
2 exam -- "Upon being introduced to the examiner, inquired
3 immediately about the purpose of the evaluation. He seemed as
4 uninterested in provoking a reaction" -- "he seemed as
5 interested in provoking a reaction as in ascertaining the
6 reason for having been pulled out of his classroom. While he
7 continued to be resistant and confrontational throughout, firm
8 limit setting and tough talk was effective in containing his
9 bravado to manageable proportion."

10 Isnt that correct?

11 A That's correct.

12 Q And so, Dr. Nagler was writing down her observations from
13 Mr. Wilson from the time he entered --

14 A That's correct.

15 Q -- the test; right?

16 And that was before he had seen any of the test;
17 correct?

18 A That's correct.

19 Q Now, you also talked about the I.Q. go back to the AAIDD
20 and saying that there is no limit on the on the I.Q.

21 Do you recall that?

22 A I said that there is no fixed cut-off score.

23 Q No fixed.

24 And you used the exam example of a 75?

25 A That's correct.

James - Recross/Cohen

1 Q Now, you understand, obviously, how a bell curve works?

2 A That's correct.

3 Q And, in a bell curve, the further away you get from the
4 mean, you get lower and lower away from that curve; correct?

5 A That's correct.

6 Q And the middle of the curve is a hundred?

7 A That's correct.

8 Q And that's the average?

9 A That's correct.

10 Q So if someone has a 75 when youre -- and that's an
11 estimate of their I. Q.; right?

12 A Yes.

13 Q Its more likely that that true I.Q. is going to be closer
14 to an 80 than it is going to be a 70 on a bell curve; correct?

15 A I don't know that that's correct.

16 Q Well, a bell curve isn't, in fact, as it gets further and
17 further away, its always pulling back to the mean, isn't that
18 correct?

19 A That is correct.

20 Q All right.

21 Now, you also talked about a learning disability.
22 You mentioned that you would say that Mr. Wilson has both mild
23 mental retardation and a learning disability; is that correct?

24 A That's correct.

25 Q And you read the transcripts from other experts in this

James - Recross/Cohen

1 case; correct?

2 A That's correct.

3 Q And you heard Dr. Olley state in this courtroom, and it
4 was brought out in other courtrooms, that it is virtually
5 impossible to have both mild mental retardation and a learning
6 disability.

7 Did you read that?

8 A Yes, I did.

9 Q And the reason that Dr. Olley made that statement is, and
10 its supported by the DSM, and Ill turn your attention if you
11 would go to Exhibit B, Tab 1, the DSM, Page 47.

12 A Yes.

13 Q And if you go to under "Differential Diagnosis" and you
14 go down to the third sentence down it says, "A learning
15 disorder or communication disorder can be diagnosed in an
16 individual with mental retardation if the specific deficit is
17 out of proportion to the severity of the mental retardation."

18 And what that means, Dr. James, isnt it that that
19 you can only have a learning disability and mental retardation
20 when the learning disability is so out of proportion to the
21 mental retardation that, in other words, someone with a
22 performance of, lets say, 70 would have a severe, like, verbal
23 of something down, like, 50; right?

24 So that it would be out of proportion, in other
25 words, the mental retardation, the verbal would be so low that

James - Recross/Cohen

1 it would be down to someone who is severely mentally retarded
2 as compared to one?

3 A They're actually not talking about verbal performance
4 there. They're actually talking about performance on an
5 achievement test.

6 So they're talking about a discrepancy between
7 performance on an achievement test and intellectual
8 functioning. And its a good point because the DSM is talking
9 about a discrepancy analysis, but, in fact, what we
10 know -- the DSM-TR was published in 2000 and discrepancy
11 analysis has been largely discredited in the learning
12 disabilities world because it just doesn't work. Having a
13 discrepancy between -- its an old way of thinking about
14 learning disabilities. The discrepancy between intellectual
15 functioning and performance on an academic achievement test.

16 So the DSM is, in fact, using an old version of
17 learning disabilities diagnosis. Current thinking in learning
18 disabilities is that there are many ways in which you can
19 diagnose a learning disability including low achievement. So
20 I don't know for sure, but I'm sure in the next iteration of
21 the DSM, the DSM will actually reflect current thinking on
22 learning disabilities which is to move away from the
23 discrepancy analysis. That's what they've done in federal
24 special education law. They no longer require states to use
25 that discrepancy analysis because it doesn't -- its no longer

James - Recross/Cohen

1 valid.

2 Q Okay.

3 So youre saying the DSM is no longer valid and you
4 disagree with Dr. Olley's testimony; correct?

5 A What I'm saying is that the DSM -- current conception,
6 the way that the DSM conceptualizes learning disability, using
7 a discrepancy analysis because that is clearly what its doing
8 as you mentioned is not the way that current thinking about
9 learning disabilities is going given research on discrepancy
10 analysis and the fact that discrepancy analysis does not, in
11 fact, work. And that's reflected in special education law,
12 but --

13 THE COURT: What law are we talking about?

14 THE WITNESS: Its IDEA. So with IDEA there's no
15 longer a requirement for the states to use discrepancy
16 analysis because it doesn't really hold water.

17 THE COURT: I'm going to ask counsel to provide a
18 citation to that in their submission.

19 MR. BURT: Sure.

20 THE WITNESS: From Fletcher's. Its in Fletcher's
21 learning disabilities book.

22 So you could still be diagnosed with a learning
23 disability, and learning disability is the way its
24 conceptualized now. One of the ways its conceptualized now is
25 thinking of low achievement. So if Mr. Wilson has these

James - Recross/Cohen

1 broader deficits in functioning and low achievement.

2 EXAMINATION BY

3 MS. COHEN:

4 (Continuing.)

5 Q Okay.

6 So, basically --

7 Well, actually, let me point to your slide. You
8 pointed out the one that we looked at with the learning
9 disability and the discrepancies on the learning disability.
10 You agreed that that slide did not include anyone with an I.Q.
11 below 80; correct?

12 A That's correct.

13 Q And in --

14 When you say that somebody with a mild mental
15 retardation, the difference between that and the learning
16 disability would be that the score is not necessarily -- is
17 not unexpected, right, because the mild mental retardation so
18 that the low score is not unexpected?

19 A The low score in academic achievement is not unexpected.

20 Q Right.

21 But you'd agree that with someone with a learning
22 disability and mild mental retardation if you have something
23 with a 70, lets say, right, on their performance, and someone
24 with a verbal on 50 that would be unusual; correct?

25 A I think we're talking about apples and oranges. I'm

James - Recross/Cohen

1 talking about a discrepancy analysis between I.Q. and specific
2 performance an achievement tests, not between two different
3 types of I.Q., verbal and performance. That's not what
4 they're referencing.

5 Q All right.

6 But even if you take it out of. I.Q. and youre
7 talking about achievement, youre talking about way down in
8 achievement; correct?

9 A What I'm talking about is not a discrepancy. The DSM
10 talks about a discrepancy. Diagnosing a learning disability
11 is about unexpected underachievement. This discrepancy
12 analysis is no longer current thinking in the field.

13 Q Okay.

14 And, again, we're not talking about diagnosis. When
15 we look at these, we're just talking about something that's
16 typical; correct?

17 A I'm sorry.

18 Q You were saying before --

19 MS. COHEN: Withdraw that. I just wanted to clarify
20 something but I think it was clear from before.

21 Q Okay. So, basically, though, you are disagreeing with
22 Dr. Olley's testimony; correct?

23 A Can you tell Lee what Dr. Olley's testimony was.

24 Q That this was virtually impossible to have a both
25 learning disability and mild mental retardation?

James - Recross/Cohen

1 A I would disagree with the fact that it's virtually
2 impossible.

3 Q Okay.

4 Now, you also testified at the beginning of redirect
5 about strengths and weaknesses; do you recall that?

6 A Yes, I do.

7 Q And that somebody who has mild mental retardation has
8 both strengths and weaknesses?

9 A That's correct.

10 Q You would agree that one with mild mental retardation has
11 global deficits across domains; correct?

12 A I think -- I don't think that that's necessarily correct.
13 I mean, I think that someone with mild mental retardation can
14 have a performance in the average area in a particular domain;
15 in fact, its not uncommon someone with an intellectual
16 disability to have good self-care skills, for example.

17 Q But in the Davis case on Page 18 of the Davis case?

18 A Mm-hmm.

19 Q You were talking about a graph from the treatise called
20 The Handbook of Learning Disabilities, and you explained the
21 question in that case starts on Page 17:

22 "QUESTION: I want to draw your attention in this
23 handbook to Page 41, and there's a graph on Page 41.

24 Before we put it up, if you could explain to us if
25 there's anything that's significant there that might help to

James - Recross/Cohen

1 explain what the difference is between learning stabilities
2 and a performance of individuals with learning disabilities
3 and those with mental retardation."

4 "ANSWER: Right. This graph really illustrates what
5 I was just explaining about individuals with mental
6 retardation having global deficits across domains."

7 Do you recall that testimony?

8 A Yes, I do.

9 Q And you also stated, you continued to talk about the
10 graph in Davis, and in the question:

11 "QUESTION: So what, in essence," this is on
12 Page 20, "that's demonstrating for the class of kids that are
13 in the below average group. Even though they may have some
14 apparent strengths, those strengths don't even come up and
15 touch the low points, the weaknesses of the kids who are
16 starting off with average I.Q.s.; is that correct?"

17 A Yes, that's correct.

18 Q ANSWER: Yes.."

19 "QUESTION: Okay."?"

20 "ANSWER: With a particular --"

21 I'm now on Page 21.

22 "ANSWER: With a particular weakness in areas such
23 as procedural learning and concept formation, and concept
24 formation is, again, considered part of what intelligence is."

25 "QUESTION: Is that in terms of the graph for the

James - Recross/Cohen

1 below average group, does that represent what you may have
2 referred to before as global deficiencies?"

3 "ANSWER: Yes."

4 "QUESTION: Okay. They're across the board?"

5 "ANSWER: Across the board. "

6 So, Dr. James, you'd agree that someone with mild
7 mental retardation has global deficits across the board;
8 correct?

9 A Yes. But within that they can also have a pattern of
10 strengths and weaknesses. Sometimes they're relative
11 strengths and weaknesses, sometimes those strengths and
12 weaknesses actually approach the average range.

13 MS. COHEN: Thank you, your Honor. No further
14 questions.

15 FURTHER REDIRECT EXAMINATION

16 BY MR. BURT:

17 Q I want to clear up this one issue about learning
18 disability.

19 Do you have the DSM in front of you here?

20 A Yes, I do.

21 Q She was reading from a section on mental retardation;
22 correct?

23 A That's correct.

24 Q On Page 449, there's a section on learning disorders?

25 A That's correct.

James - Recross/Cohen

1 Q And Page 51 there's a sentence there about differential
2 diagnosis about mental retardation.

3 Begins, "In mental retardation?"

4 A On Page 51?

5 Q Yes.

6 A Yes.

7 Q Could you read that?

8 A "In mental retardation, learning difficulties are
9 commensurate with general impairment in intellectual
10 functioning."

11 Q And the rest of it.

12 A "However in some cases of mild mental retardation, the
13 level of achievement in reading, mathematics, or written
14 expression is significantly below expected levels given the
15 person's schooling and severity of mental retardation. In
16 such cases, the additional diagnosis of appropriate learning
17 disorders should be made."

18 Q So does that say that a learning disorder and mild mental
19 retardation are impossible to diagnose in the same individual?

20 A They're not impossible to diagnose, no, it doesn't say
21 that.

22 Q And this provides guidance of when you make the
23 diagnosis?

24 A That's correct.

25 Q And how is this language consistent or inconsistent with

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1 your conclusion that he has both a learning disability?

2 A Its not inconsistent.

3 Q It is not inconsistent?

4 A No.

5 Q Okay.

6 You were asked about the definition of learning
7 disability, and I think you said that the DSM is -- I forget
8 how you characterize it -- but basically not up to date in
9 terms of the research.

10 A That is correct.

11 Q Are you familiar with the Mr. Robert Mapou's, "Adult
12 Learning Disabilities and ADHD"?

13 A Yes, I am.

14 Q You read this bench and rely upon it in forming your
15 opinions?

16 A Yes, I have.

17 Q He's going to be an expert in this case.

18 A Yes.

19 Q One of the Government's experts?

20 A Yes.

21 Q He says at Page 9 of his book, "For now only the
22 DSM-IV-TR provides the" -- for now --

23 MR. BURT: Strike that.

24 Q He says, "None of these definitions," and he talks about
25 the IDEA definition of which Ill get to in a moment. "None of

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1 these definitions provide diagnostic criteria for, or
2 characteristics of, specific learning disabilities. For now,
3 only the DSM-IV-TR provides that and the DSM-IV-TR
4 definitions, in the author's opinions, are lacking in
5 specificity and do not reflect the state of knowledge today."

6 Do you agree with that?

7 A That is correct, I do agree with that.

8 Q And do they not reflect the state of knowledge today
9 because of this discrepancy?

10 A That is correct.

11 Q The type of analysis that they use?

12 A That's correct.

13 Q Okay.

14 And he also quotes the IEDA definition which is
15 Public Law 108.446 at Page 6 and quotes the law as defining a
16 learning disability as, "Specific learning disability means a
17 disorder in one or more of the basic psychological processes
18 involved in understanding or in using language, spoken or
19 written, that may manifest itself in an imperfect ability to
20 listen, think, speak, read, write, spell, or do mathematical
21 calculations. The term includes such conditions as perceptual
22 handicaps, brain injury, minimal brain dysfunction, dyslexia,
23 and developmental aphasia.

24 The term does not include children who have learning
25 problems that are primarily the result of visual, hearing, or

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1 motor handicaps, of mental retardation, an emotional
2 disturbance, or have environmental, cultural, or economic
3 disadvantage."

4 Is that the IDEA definition?

5 A Yes, it is.

6 Q And that does not refer to any sort of discrepancy
7 analysis?

8 A That's correct.

9 Q And is that what you were referring to?

10 A Yes, that's correct.

11 Q Does Mr. Wilson fit within the definition of a learning
12 disability and mental retardation within the meaning of that
13 definition?

14 A Very clearly.

15 Q Okay.

16 MR. BURT: Thank you. That's all you have.

17 MS. COHEN: One more.

18 THE COURT: Yes, let me go back to I.Q. tests
19 because yesterday the witness indicated that she would give
20 less weight to I.Q. tests that are not adequately supported by
21 raw data.

22 Lets assume that all of the I.Q. tests were validly
23 conducted. That's assuming that raw data did not shown any
24 flaws in the testing.

25 How would you evaluate Mr. Wilson's intellectual

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1 functioning if we assumed that they were all validly
2 conducted.

3 THE WITNESS: All of the I.Q. tests that he's been
4 given, except for one, and Dr. Popp's have overlapping
5 confidence in that its suggesting that that true score falls
6 somewhere in that confidence interval.

7 And, in my mind, when I take a look at these scores
8 and I think about the criteria as laid out by AAIDD, they're
9 all low enough for me to say, okay, given the -- and youre
10 saying they're validly conducted to take the next step and
11 take a look at other information that may help me make a
12 diagnosis from a clinical judgment standpoint. I have enough
13 concern about these scores to say, let me look at other kinds
14 of testing, let me look at adaptive functioning, to make a
15 determination.

16 THE COURT: Now, I'm sorry, the Flynn-corrected
17 scores.

18 THE WITNESS: Right.

19 THE COURT: Are, except for one, in the mid-70 or
20 greater range, isn't that right?

21 THE WITNESS: Yes.

22 THE COURT: So what does, assuming that the tests
23 were validly conducted, what does that tell you about the
24 defendant's intellectual functioning based on I.Q.?

25 THE WITNESS: These are very low scores. They're

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1 telling me that I.Q. is very much a problem. Its problematic,
2 these are all very low scores. As I said, when I look at 75,
3 knowing that a 75 1.76 standard deviations below the means, an
4 80 is 1.75 standard deviations below the means, those are all
5 low.

6 THE COURT: His score in four months before his
7 18th birthday, which is of significant cut-off point, using
8 the Flynn correction was 82.35, though, wasn't it?

9 THE WITNESS: Yes. And that stands out in
10 relation to the others.

11 THE COURT: Now, you didn't do in your report. You
12 didn't do an analysis of his adaptive functioning, did you?

13 THE WITNESS: No, I didn't.

14 THE COURT: Why didn't you do that?

15 THE WITNESS: Because I knew that there were other
16 experts that were going to be assessing adaptive functioning
17 in a more systematic way. But I considered it important to
18 look at the information that was given to me in the record and
19 I found many examples of deficient adaptive functioning.

20 And I think, again, where I was thinking about the
21 idea of clinical judgment and turning to those kinds of
22 examples like I mentioned -- his inability to read a clock at
23 nine, he had an I.E.P where at 12 it talks about a goal to
24 being able to speak in full sentences. I knew from the review
25 of the records that there were significant deficits in his

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1 functional academics and in his communication skills. It give
2 me concern.

3 THE COURT: You also indicated that you didnt do
4 your own I.Q. tests but you did a lot of other tests.

5 In terms of the effect that repeated testing might
6 have on the inflation of test scores --

7 THE WITNESS: Yes.

8 THE COURT: -- wouldnt it have been useful to have
9 the benefit your tests which by definition would have been
10 properly conducted?

11 THE WITNESS: I did -- I'm sorry.

12 THE COURT: You didnt do your own I.Q. test?

13 THE WITNESS: No.

14 THE COURT: Wouldnt it have been helpful to have a
15 test done by you which would have been by definition properly
16 conducted.

17 THE WITNESS: I made the decision not to do an
18 I.Q. test just because I felt that with this concept of
19 progressive error, again, nine times in maybe 25, 24 years,
20 the ninth Wechsler instrument I'm not sure how I would be able
21 to interpret that given all these factors. I felt that the
22 neuropsychological test would better illuminate some of the
23 broader deficits than an I.Q. test would.

24 THE COURT: So in terms of that potential problem --

25 THE WITNESS: Yes.

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1 THE COURT: -- of repeated testing, what's the
2 cut-off point? Is it the first WISC, second WISC-R, the
3 WISC-III, the WAIS-III?

4 If the Court is going to draw the line on what's a
5 valid outcome for purposes of deciding whether the defendant
6 should be qualified to be considered for the death penalty,
7 where would I put that red line in among these scores, in your
8 opinion?

9 THE WITNESS: Well, I don't think there is a red
10 line. I think that we're looking -- when we look at these
11 scores, and we see how low these scores are, and given the
12 admonition of the AIDD to look at some of the things that
13 affect what we full scale scores are, the error factors, the
14 Flynn effect, The Practice Effects. Knowing that some of
15 these scores are affected by error that we just-- that we're
16 not able to quantify. I think the scores themselves are low
17 enough to say, okay, I can use my clinical judgment by looking
18 at other factors to make that determination.

19 THE COURT: The Court doesn't have clinical
20 judgment, the Court has legal judgment, and I'm asking you, if
21 the Court has to make a decision based on I.Q. scores, where
22 does the Court draw the line?

23 That's the question here. This is not an open-ended
24 discussion at a conference among neuropsychologists, this is a
25 court of law, and the Court has to make a judgment and that's

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1 the quandary here. And I'm asking you where do I draw the
2 line.

3 THE WITNESS: What I'm saying is there is no
4 specific, you can't draw the line as at specific score. You
5 can't say its 75 or 78 or 73. I mean, that's what the AAIDD
6 says, you can't do that. You look at this idea of it being
7 approximately two standard deviations below the mean given all
8 the factors of error youre considering and then you look at
9 adaptive behavior.

10 THE COURT: But you didnt do that analysis of
11 adaptive behavior in your report.

12 THE WITNESS: No.

13 THE COURT: All right. Thank you very much.

14 The witness is excused. You may stand down.

15 THE WITNESS: Thank you very much.

16 THE COURT: Have a nice day.

17 THE WITNESS: Thank you.

18 (Witness leaves the witness stand.)

19 THE COURT: Youre standing.

20 MS. COHEN: I'm standing.

21 THE COURT: Why are you standing?

22 MS. COHEN: I move to strike this witness's
23 testimony on the learning disability because that was not a
24 conclusion in her report and that was a conclusion that she
25 stated today for the first time that she's diagnosing him as

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1 having both mental retardation and a learning disability.

2 THE COURT: Yes.

3 MR. BURT: I think its within the scope of her
4 report, your Honor.

5 THE COURT: Well, you can show me where.

6 MR. BURT: Sure.

7 THE COURT: Ill reserve on that.

8 Okay. Next witness. You may call your witness.

9 MR. BURT: We need one moment to step outside and
10 get him.

11 THE COURT: Sure.

12 MR. BURT: Your Honor, I have marked as next in
13 order Exhibit R which is a binder; and Exhibit S, also a
14 binder both related to this witness's testimony.

15 THE COURT: Okay. Very good.

16 MR. BURT: Could I approach to hand this up.

17 THE COURT: While we're waiting, I need a side bar.
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1 (Continued on the next page.)

2 (Side bar conference held on the record in the
3 presence of the Court and counsel, out of the hearing of the
4 jury.)

5 THE COURT: I didn't want to say this in front of
6 everyone but when you address the other side, you use
7 "opposing counsel," please don't use pronouns or "her" or
8 "his" or "him." --

9 MR. BURT: Sure.

10 THE COURT: -- or "he." I prefer if you said either
11 the name of the opposing counsel or opposing counsel, okay.

12 MR. BURT: Sure.

13 THE COURT: Thanks.

14 (Side bar discussion concludes.)
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1 (Continued on the next page.)

2 (In open court.)

3 THE COURT: Okay. The witness can please come on
4 up.

5 (Witness takes the witness stand.)

6 THE COURT: Please raise your right hand, sir.

7 GEORGE W. WOODS, JR., called by the Defendant, having been
8 first duly sworn, was examined and testified as follows:

9 THE WITNESS: I do.

10 THE COURT: Please be seated.

11 THE WITNESS: Thank you very much.

12 THE COURT: And could we, does the witness need all
13 of the binders that are up here at the moment?

14 MR. BURT: I'm wondering if I could approach and
15 clear it off.

16 THE COURT: Yes, that would be helpful. And then
17 you can please be seated. You can provide him with the
18 binders as the issues come up.

19 MR. BURT: Sure.

20 THE COURT: All right.

21 MR. BURT: Yes.

22 THE COURT: Also that way he wont trip on the
23 binders. We're trying to avoid any kind of need for physical
24 problems.

25 Okay, sir, please state and spell your full name for

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1 the record.

2 THE WITNESS: George W. Woods, Jr. G-e-o-r-g-e.
3 W. W-o-o-d-s.

4 THE COURT: All right. You're calling George W.
5 Woods as your witness; correct?

6 MR. BURT: Yes, your Honor.

7 THE COURT: You may proceed.

8 MR. BURT: Thank you very much.

9 DIRECT EXAMINATION

10 BY MR. BURT:

11 Q Good morning, sir.

12 A Good morning.

13 Q Could you tell us your business or occupation?

14 A Yes, I'm a physician specializing in neuropsychiatry.

15 Q And, Doctor, have you brought with you to the witness
16 stand two binders of material which are right in front of you as
17 Exhibit R and S?

18 A Yes.

19 Q Would you tell us just briefly what's in that first
20 binder, Exhibit R?

21 A Exhibit R includes my report on in this case, my CV, the
22 raw data which would include my notes, and the I.Q. scores of
23 this -- in this case.

24 Q Okay. And then the second binder, Exhibit S?

25 A This second binder includes my PowerPoint and it also

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1 includes literature that I have provided in this case.

2 Q And that you are going to refer to during your testimony?

3 A Yes.

4 Q Now, does your PowerPoint set forth the standards that
5 you used to assess intellectual disability in this case?

6 A Yes.

7 Q In the interest of time, we're not going to go through
8 those slides; is that correct?

9 A That's correct.

10 MR. BURT: Your Honor, at this point, I would
11 introduce in evidence Exhibits R and S.

12 THE COURT: Any objection.

13 MR. McGOVERN: No, your Honor.

14 THE COURT: All right. Defense exhibits R and S are
15 received without out.

16 (Defendant's Exhibits R and S was marked in evidence
17 as of this date.)

18 Q Doctor, you said you are a neuropsychiatrist. Would you
19 tell the Court what a neuropsychiatrist does especially as it
20 relates to what a forensic psychiatrist does?

21 A Yes, a neuropsychiatrist looks at issues of the brain and
22 cognitive functioning as well as psychiatric issues.

23 In the last 50 years, we've had a real transition in
24 understanding the brain more effectively, and although not in
25 any way completely and recognizing that many of the behaviors,

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1 many of the illnesses, and many of the disorders that used to
2 have a specific psychiatric designation are really have
3 cognitive underpinnings.

4 Q Cognitive, meaning, brain impairment?

5 A Brain impairments, that's correct. And so, in my
6 practice in neuropsychiatry, I try to use more physical
7 examination, neurocognitive examination as well as psychiatric
8 examination in determining the problems that -- and
9 potentials -- that a person may have.

10 Q And does your work as a neuropsychiatrist also involve
11 evaluating such things as neuroimaging?

12 A Yes. I take into consideration neuroimaging,
13 neuropsychological testing as well. I consult probably more
14 with neurologists and neuropsychologists and neuroradiologists
15 than the average psychiatrist would.

16 Q And can you give the Court a brief synopsis of your
17 background and training that qualifies you to be a
18 neuropsychiatrist?

19 A Sure. I did, I finished my medical degree at the
20 University of Utah in Salt Lake City in 1977. I then came to
21 California and did a rotating medical internship rather than a
22 psychiatric internship. And during that time, I took surgery;
23 I took extra electives in neurology; I did Ob-Gyn; I did
24 internal medicine; I also worked in the emergency room.

25 I then did a psychiatric residency at Pacific

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1 Presbyterian Hospital in San Francisco and I was chief
2 resident my last year.

3 During that residency, I worked as a family
4 practitioner for the United Farm Workers in Southern
5 California doing family medicine.

6 I also worked as an emergency room physician as well
7 in both psychiatric and medical facilities.

8 At the end of my residency, I did a fellowship with
9 the National Institute of Mental Health and the American
10 Psychiatric Association in geriatric psychopharmacology and
11 this was a two-year fellowship. And during that fellowship, I
12 specifically focused on the relationship between medications,
13 metabolism, and age. And that was a specific focus because
14 what we see is that on both ends, both in terms of pediatrics
15 and in geriatrics medications and their relationship can be
16 very, very different. Metabolism changes the ways the
17 medications are use utilized in the body changes and I felt it
18 would be a good primer.

19 I then started my practice in psychiatry. During my
20 residency, I also I think I mentioned this, I also took
21 courses in neurology in order to enhance my psychiatric
22 knowledge, not to become a neurologist, but to enhance my
23 psychiatric knowledge.

24 And in 1992, I was Board Certified in Psychiatry.
25 And since that time, I've been practicing both psychiatry and

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1 neuropsychiatry.

2 Q Now, at a certain point in your career, did you become
3 interested and involved in developmental disabilities such as
4 intellectual disability?

5 A Yes.

6 Q And can you tell me how you got interested in that
7 particular field and what your experience is in particular in
8 developmental disabilities?

9 A Well, there are two factors, actually. Both of them were
10 besides my ongoing interest in neurology. In 1998, my wife
11 developed a severe head injury; and in 2003, when my father
12 died, he told me that, you know, me being a smart
13 psychiatrist, he told me that I would have to start to take
14 care of my brother. And my brother is 10 years, 15 years
15 younger than I am. I've been gone from Omaha for many years
16 and did not realize that my brother was mildly mentally
17 retarded.

18 My father gave me -- before he died, he gave me the
19 materials, he showed me the testing in high school.

20 My brother had never left home. He had worked all
21 his life, he drove, and I just thought he was a kind of
22 beer-drinking football-loving kind of guy.

23 It was at that point -- and then his mother died in
24 2008. It was at that point that I began to really understand
25 the complexity of developmental disorders and began to look at

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1 it more academically and as part of my practice.

2 Q Now, as part of your practice, what amount of your
3 patient population is -- are intellectual disabled?

4 A In terms of intellectual disability, its about
5 15 percent. My patient population, I have a clinical
6 practice, I maintain a clinical practice, and my patient
7 population extends both in terms of intellectual disabilities
8 as well as neurodevelopmental disabilities. Those are --
9 intellectual disabilities are neurodevelopmental disabilities,
10 but I also see people that have acquired disabilities such as
11 traumatic brain injury, infectious diseases that also have
12 psychiatric manifestations or behavioral manifestations.

13 Q Now, you also have a forensic practice; correct?

14 A Yes.

15 Q And since the Atkins case was decided in 2002, have you
16 been involved in doing Atkins assessments in death penalty
17 cases both state and federal?

18 A I have. Since about 2005, and I apologize because in my
19 report, I said, "Nine years," I went back and looked. Its
20 been about seven years actually.

21 Q Okay.

22 And approximately how many Atkins assessments have
23 you done?

24 A About 40.

25 Q Are all these 40 cases, cases where you have testified?

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1 A No.

2 Q What percentage have you testified in Atkins cases?

3 A I've testified in about six.

4 Q Six of the 40?

5 A That's correct.

6 Q Are some of them still pending, some of them --

7 A There are some that are still pending. That does not
8 include -- those are the ones that I've actually done
9 assessments in.

10 Q Mm-hmm.

11 A I testified in about 12 percent of the cases that I
12 actually consult in. In Atkins, its probably closer to
13 18 percent.

14 Q Okay.

15 Now, do you belong to the AAIDD?

16 A Yes.

17 Q And when did you become a member of that organization?

18 A I believe it was 2008.

19 Q Are you familiar with the publications of the AAIDD on
20 intellectual disabilities?

21 A Yes, I am.

22 Q Specifically, the Green Book and all the predecessors
23 that came before the Green Book?

24 A Yes. As well as the user manuals.

25 Q Okay.

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1 Have you read them all, and do you use them in your
2 clinical and forensic practice?

3 A I used them in my clinical practice. I have read
4 portions of the 1992, 1982, and 1973 manuals. I have not read
5 them completely, but I've read pretty significant portions of
6 this.

7 Q You state in your rsum which, I assume, accurately sets
8 forth your qualifications?

9 A That's correct.

10 Q You say in your rsum that you are a member of the
11 Executive Committee for the Challenging Behaviors Special
12 Interest Research Group?

13 A Yes.

14 Q What is that?

15 A The International Association For the Specialized Studies
16 of Developmental Disorders. It's an international
17 organization that looks at developmental disabilities, and
18 they have a number of what they call "Special Interest
19 Research Groups."

20 Can I let my shoes, pop those for a minute.

21 And so they have a number of special interests.
22 They have a special interest research in aging; I'm a member
23 of that group as well. They have a special interest in what
24 they call "Challenging Behaviors."

25 And challenging behaviors are those behaviors that

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1 may be secondary to the developmental disorder, the type of
2 disorder, the type of brain impairment that a person may have.

3 And those behaviors may be aggressive, they may be
4 withdrawn, they may be a number of ways those behaviors
5 manifest themselves. And this last year, this last summer, I
6 was elected to the Executive Committee of that particular
7 Special Interest Research Group.

8 Q And do you monitor their publications in the area through
9 that research group?

10 A Yes. I'm actually the editor of that Special Interest
11 Research Group's newsletter, but they have other journals as
12 well.

13 Q Now, youre familiar that the AAIDD has this Green Book
14 that they published in 2010?

15 A Yes, that's the newest edition.

16 Q A user's manual that they published this year in 2012?

17 A That's correct.

18 Q Is there a research project that is underway to provide a
19 guide, "AAIDD Guide to Death Penalty Cases"?

20 A Yes. Professor Edward Polloway and Professor James
21 Patton, P-o-l-l-o-w-a-y, are the editors of this particular
22 manual looking at intellectual disabilities and the death
23 penalty. And they asked me to be an invited author in this
24 particular manual. I believe that I am the only psychiatrist
25 that is part of this author group.

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1 Q And when is the book -- is it a book or a manual?

2 A Its a book that's coming out in, I think, the name of it
3 is the "AAIDD Guide to the Death Penalty." Its coming out in
4 2013.

5 Q All right.

6 And you said you were asked to write some chapters
7 for that manual?

8 A Yes.

9 Q Take a look at Exhibit B. And the first, not the first
10 article, but the second one I believe its called "Age of Onset
11 and the Developmental Period Criterion"?

12 A (Complying). Yes.

13 Q Is that an article that is now in press for that guide?

14 A Yes. This is an article that was accepted about two
15 weeks ago that's now in print.

16 Q And who wrote the article by sides yourself?

17 A Dr. Steven Greenspan.

18 Q And who is Dr. Greenspan and what is his standing in the
19 field of intellectual disability?

20 A Dr. Steven Greenspan is a developmental psychologist. He
21 was the formulator of what's called The Tripartite Approach to
22 Mental Or Intellectual Disability. And I apologize there may
23 be times when I say "mental retardation" or "intellectual
24 disability," they are synonymous.

25 He is the one is the idea of there being three parts

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1 as he describes, three legs to the stool of intellectual
2 disability -- I.Q., age at 18, although that's changing in
3 some jurisdictions, and also adaptive functioning.

4 He is the most cited author in the AAIDD Green Book
5 and has received both the top awards from the AAIDD as well as
6 other international organizations.

7 Q And do you cooperate with him on a regular basis on
8 issues involving intellectual disability?

9 A Yes, Dr. Greenspan and I have a series of articles. I
10 think our first article was written in 2011 which was
11 published in the Australian Journal of Intellectual and
12 Developmental Disabilities.

13 We've also collaborated on an article looking at
14 cognitive disorders in Fetal Alcohol Spectrum Disorder which
15 was published out of Harvard's Journal of Law and Psychiatry
16 in, I believe, 2011. We got two articles in this journal, in
17 the "AAIDD Guide to the Death Penalty" manual, and we're in
18 the process of writing a book.

19 Q Okay.

20 The articles that you reference, are they in Exhibit
21 B, first of all, the article entitled "Intelligence Involves
22 Risk Awareness and Intellectual Disability Involves Risk
23 Unawareness, Implications of the Theory of Common Sense."

24 A That's correct.

25 Q By yourself, Steven Greenspan, and Harvey Switzky,

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1 S-w-i-t-z-k-y?

2 A That's correct.

3 Q Published in the Journal of Intellectual and
4 Developmental Disability in December of 2011?

5 A That's correct.

6 Q Okay. The next article in that binder is a chapter from
7 the upcoming AAIDD Guide to Death Penalty Cases called "Age of
8 Onset and the Developmental Period Criterion"?

9 A That's correct.

10 Q Does that chapter address issues about the third prong,
11 the age of onset prong?

12 A Yes.

13 Q Okay. In the next section, there is a Chapter 18
14 entitled "Intellectual Disability Comorbid Disorders and
15 Differential Diagnosis" by yourself and David Friedman?

16 A Yes.

17 Q Is that also going to be part of this manual?

18 A Yes. This article has actually been accepted, I mean,
19 this article has been accepted for about a month.

20 Q Okay.

21 The next article in that binder is called
22 "Neurobehavioral Assessment in Forensic Practice" by yourself,
23 David Friedman, and Steven Greenspan; correct?

24 A That's correct.

25 Q What is this article about?

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1 A This was an article that was an invited article. I'm
2 sorry, I have a -- I have a catch in my throat, I apologize.

3 This is an article that was an invited article for a
4 special edition of the international Journal of Law and
5 Psychiatry. This was a journal dedicated to professor Thomas
6 Gutheil who is the director of the Institute of Law and
7 Psychiatry at Harvard University. And it is the -- the focus
8 is forensic psychiatry, expertise treatment, and public
9 policy. And this journal, there is a two-part journal,
10 actually, and this was the article that I was asked to write
11 for this journal.

12 Q Does it set forth the standards for what's called
13 "Neurobehavioral Assessment in Forensic Practice"?

14 A Yes.

15 Q Basically, telling practitioners about how they go back
16 doing a neuropsychiatric evaluation in a forensic context?

17 A That's correct. Particularly looking at developmental
18 disorders.

19 Q And does it specifically talk about things like
20 intellectual assessment, adaptive functioning, the prongs of
21 the Atkins Test?

22 A That's correct.

23 Q Okay.

24 And did you, in fact, use the approach outlined in
25 this article in this case to conduct your assessment?

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1 A Yes, this is the approach that I use both in forensic
2 settings. But I need to say that its drawn from my clinical
3 practice.

4 Q Okay.

5 And that was published in the International Journal
6 of Law and Psychiatry in 2012, this year?

7 A That's correct.

8 Q And the next article in that binder by you and Steven
9 Greenspan and Bhushan Agharkar?

10 A That's correct.

11 Q Called "Ethnic and Cultural Factors in Identifying Fetal
12 Alcohol Spectrum Disorders"?

13 A Yes.

14 Q Does that article discuss something called "cultural
15 overshadowing" in the diagnosis not only of Alcohol Fetal
16 Syndrome but other stabilities as well such as intellectual
17 disabilities?

18 A Yes. This article, as well as the first article on
19 awareness, risk awareness, and risk unawareness. Both discuss
20 the idea that's now well founded in the literature of cultural
21 overshadowing.

22 Q What does that mean?

23 A Cultural overshadowing is really a phenomenon that
24 reflects a past history of assigning culture as the sole
25 factor for certain mental, physical, and environmental

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1 behaviors; and it really seems to have sprung out of the 1950s
2 and 1960s when culture was not taken into consideration when
3 someone's ethnicity, when someone's environmental background,
4 when someone's educational development may not have been taken
5 fully into consideration. People ensured that culture would,
6 in fact, be part of the landscape.

7 What we see now, as our understanding of brain
8 development and neurodevelopment and developmental psychology
9 has really grown, that that cultural overshadowing continues
10 to limit the differential diagnosis.

11 And so, you will often see someone's culture be used
12 as an explanation for behaviors for limitations and perhaps at
13 times for strengths; that, when you look at it, is only one of
14 several possibilities of reasons for that behavior. And
15 that's what cultural overshadowing really means.

16 Q And you are discussing that phenomenon in this article?

17 A That's correct.

18 Q You said, I believe, that you've testified six times in
19 Atkins hearings?

20 A That's correct.

21 Q In death penalty cases?

22 A Yes.

23 Q Where have those been that you testified?

24 A In Baltimore, Maryland.

25 Q Was that the Davis case?

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1 A Yes. In Cleveland, Ohio.

2 Q Was that Anton Lewis?

3 A That's correct.

4 Q Federal case?

5 A Yes. In Florida, that was the Ronnie Williams case, that
6 was a state case that's fairly recent. Those are the three
7 that come to mind.

8 THE COURT: Are these in the witness's CV? If not.

9 MR. BURT: I don't think the specific cases, your
10 Honor.

11 THE COURT: If you want to put it forward just
12 provide it.

13 MR. BURT: I will do that.

14 THE COURT: Do you want to qualify this witness as
15 an expert?

16 MR. BURT: I do, your Honor. The area would be
17 neuropsychiatry and intellectual disabilities.

18 THE COURT: Any objection?

19 MR. McGOVERN: Just a brief voir dire.

20 THE COURT: Yes, you certainly may.

21 MR. McGOVERN: Thank you.

22 VOIR DIRE EXAMINATION

23 BY MR. McGOVERN:

24 Q Good afternoon, Doctor.

25 A Good afternoon.

Woods - Voir Dire/McGovern

1 Q How are you? Nice to see you again.

2 Doctor, I just want to ask you some questions about
3 your clinical practice?

4 A Yes.

5 Q You said you maintain a clinical practice; is that right?

6 A Yes.

7 Q About how many patients are you seeing on a regular
8 basis?

9 A Probably 70.

10 Q Seventy patients?

11 A Yes.

12 THE COURT: Is this normal psychotherapy?

13 THE WITNESS: I do both psychotherapy, your Honor,
14 as well as assessments in other areas.

15 THE COURT: Okay. Thank you. Go ahead.

16 EXAMINATION BY

17 MR. McGOVERN:

18 (Continuing.)

19 Q So, in your clinical practice, youre routinely doing
20 evaluations of folks?

21 A Yes.

22 Q And did I hear you correctly that you said you've done 40
23 Atkins evaluations in the last seven years?

24 A I think that's correct, yes.

25 Q So youre almost doing six Atkins cases a year; is that

Woods - Voir Dire/McGovern

1 right?

2 A In terms of assessments, yes.

3 Q Okay.

4 And so does that interfere with your ability to
5 manage those 70 patients that youre seeing regularly?

6 A No, it doesn't. Although many of my patients I have seen
7 for awhile, and this is relevant to the case, I see some
8 patients when I'm traveling on FaceTime. I've actually used
9 Skype. Many my patients are able to use technology and we use
10 technology to do that. Many of my patients also because they
11 have significant developmental disorders I don't see them on a
12 weekly basis the way you would in terms of someone with
13 psychotherapy.

14 Q Okay.

15 So the psychiatry offices of Dr. George Woods are
16 not open on a daily basis with people coming in and out and
17 making appointments to come and see you; is that right?

18 A Well, they're making appointments to come and see me, but
19 I see patients in my office regularly.

20 Q Okay.

21 I just wanted to follow up on some questions that
22 Mr. Burt asked you about the -- youre member of the AAIDD?

23 A That's correct.

24 Q And now you've been invited to be an author or
25 contributor in their guide to the death penalty?

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1 A That's correct.

2 Q Okay. And that article that you mentioned here today, or
3 the chapter that you mentioned here today, has that been
4 published?

5 A They're in press, they'll be published in January of
6 2013, I believe.

7 Q Okay. So that's going to be -- that will be a month from
8 now that'll be out?

9 A That's correct.

10 Q And you testify exclusively for the defense; correct?

11 A I've never been asked to testify or be retained for the
12 Government.

13 Q Okay.

14 A So that's really what it is, I've never been asked.

15 Q But you're testified hundreds of times?

16 A I've testified a lot. Not hundreds but a lot.

17 Q More than a hundred?

18 A The last time that I counted, which was two years ago, it
19 was about 70.

20 Q Okay.

21 A Yes, so I testified about up until two years ago, I
22 testified in about eight percent of the cases that I consulted
23 on. Its up to about 12 percent now.

24 Q Okay.

25 So would it be fair to say you testified about 80

Woods - Voir Dire/McGovern

1 times as of now?

2 A Yes.

3 Q Okay.

4 And that's exclusively for the defense; correct?

5 A In my forensic practice. In my civil practice, I testify
6 and do evaluations. I hesitate to say "testify" because what
7 I do is evaluations and then it determines whether I testify.

8 Q Well, why don't we back off of that then.

9 A Okay.

10 Q You exclusively do evaluations in the criminal context
11 for the defense; correct?

12 A No. I have never been asked to do evaluations for the
13 Government. Consequently, all the evaluations I've done have
14 been for the defense.

15 Q Okay.

16 So we would agree that all of your evaluation work
17 and assessment work in the criminal context has been for the
18 defense and I would appreciate the caveat that the Government
19 has never asked you?

20 A That's correct.

21 Q Fair enough. And the AAIDD named you as the sole
22 psychiatrist who is going to be part of this guide to the
23 death penalty?

24 A No, they didnt name me. The authors picked a group of
25 people to provide articles, and as far as I know, I'm the only

Woods - Voir Dire/McGovern

1 psychiatrist that was asked. That's just how it happened.

2 Q Yes. And I'm just asking you how it happened.

3 And so youre the only psychiatrist who, as you know,
4 at this point, who is contributing to the AAIDD manual on --
5 "The Guide to the Death Penalty"?

6 A That's correct.

7 Q And as far as you know, are the folks at the American
8 Psychological Association who promulgated the DSM, are they
9 writing some death penalty articles, too, or not?

10 A Actually, the American Psychiatric Association
11 promulgated the DSM.

12 Q Sorry.

13 A And this is actually -- so I can't really comment on
14 that. I would say that, of course, the American Psychiatric
15 Association has a number of people that have written -- that
16 are members -- that have written articles around the death
17 penalty.

18 Charles Applebaum, who is the former president of
19 the American Psychiatric Association, has written a number of
20 articles on the death penalty who is the Director of Law and
21 Psychiatry at Columbia University.

22 Q I don't want do run far afield of the question.

23 You would agree that the American Psychiatric
24 Association is not putting out a book that deals with the
25 death penalty as far as you know? As an association?

Woods - Voir Dire/McGovern

1 A I really wouldn't know that.

2 MR. McGOVERN: All right. Thank you, sir. No
3 objection.

4 THE COURT: All right. And the expertise is.

5 MR. BURT: Neuropsychiatry and intellectual
6 disabilities.

7 THE COURT: All right. The motion is granted.

8 MR. BURT: Thank you.

9 THE COURT: All right. What we're going to do now
10 is well take an hour for lunch. And then after lunch well
11 have whatever questions you need to ask to supplement the
12 report that the witness has provided as an expert witness,
13 okay. Thank you.

14 MS. COHEN: Thank you.

15 MR. BURT: Thank you.

16 (Witness leaves the witness stand.)

17 (Continued on the next page.)

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Proceedings

1 A F T E R N O O N S E S S I O N

2 2:05 p.m.

3 (In open court; defendant present.)

4 THE COURT: Please be seated.

5 All right, Mr. Burt, you may continue the
6 examination of your witness.

7 MR. BURT: Thank you, your Honor.

8 THE COURT: I remind the witness that he is still
9 under oath.

10 THE WITNESS: Thank you, your Honor.

11 MR. BURT: May I approach the witness, your Honor?

12 THE COURT: You certainly may.

13 BY MR. BURT:

14 Q Before the lunch hour you were asked a question about
15 what standards there were within the psychiatric profession
16 for doing Atkins cases?

17 A Yes.

18 Q You have a binder there in front of you, Exhibit B in
19 evidence, and I've opened it to an article. Could you tell us
20 the name of that article and whether you're familiar with it?

21 A Yes. This article is named Atkins -- if I may move this?

22 Q Sure.

23 A "Atkins v. Virginia: Implications and recommendations
24 for forensic practice."

25 Q And where was that published?

Woods - Direct/Burt

1 A It was published in the Federal Legal publication for
2 Journal of Psychiatry & Law; Summer/Fall of 2009.

3 Q And is that a publication within the psychiatric field?

4 A Yes, it's a publication that's in forensic psychiatric
5 view.

6 Q Is that a publication you're familiar with as setting
7 forth the standards for doing Atkins evaluations within the
8 psychiatric profession?

9 A Yes. This is an article that was published by
10 Dr. Gilbert Macvaugh and Dr. Mark Cunningham, a psychologist,
11 that lay out the recommendations for best practices in looking
12 at Atkins cases.

13 Q In a psychiatric journal?

14 A That's correct.

15 Q And how are their recommendations for best practice, how
16 do they align with the AAIDD standards?

17 A Well, they're very consistent. For example, they
18 recommend the use of the Flynn affect when looking at IQ
19 tests, which is consistent with the AAIDD. They recommend
20 comprehensive social histories when evaluating clients. They
21 recommend against using the client as an adaptive functioning
22 respondent because of what's called the cloak of competence.
23 The cloak of competence is the appearance of being able to do
24 things that perhaps they really cannot -- that person cannot
25 do. And we see this very consistently within the intellectual

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1 disability population.

2 They discuss the difficulty with the use of prison
3 personnel, correctional officers. And they also discuss the
4 difficulty in assessing adaptive functioning within a criminal
5 environment or a crime. So those are just some of the things
6 that the article outlines as being best practices.

7 Q Are those the practices you used in this case in doing
8 your evaluation?

9 A Yes, those are consistent with the AAIDD standards.

10 Q Doctor, the experts who have testified so far have
11 characterized their role as focusing on one domain over the
12 others, for instance, adaptive functioning. Dr. Olley, I
13 think Dr. James said she was focusing primarily on the IQ
14 prong. What was your focus in this case?

15 A I think my focus was to look at the issues of clinical
16 judgment as it related to all the prongs to determine was the
17 proper assessment done and how is that proper assessment
18 completed. Because it has -- that has to be -- that has to
19 effect all prongs, be it the IQ prong, the adaptive
20 functioning prong. The manifestation before 18 is pretty
21 straightforward. So I think that was my role, was to try to
22 synthesize and gain a clinical understanding of what was going
23 on with Mr. Wilson before moving on to forensic termination.

24 Q Did you reach a determination as to all three prongs
25 based on your own clinical judgment --

Woods - Direct/Burt

1 A Yes.

2 Q -- and the evaluations of others?

3 A Yes.

4 Q And what was your clinical judgment?

5 A Well, it's my clinical judgment that certainly Mr. Wilson
6 qualifies and has qualifying scores to meet the IQ prong.

7 It's also my professional opinion that Mr. Wilson
8 meets the adaptive functioning prong as well. I also -- as I
9 look through the history, and particularly the developmental
10 histories of Mr. Wilson, I see that these problems manifested
11 themselves before the age of 18 and that's what's very
12 important in the current standards, is that prong has to occur
13 before the age of 18.

14 Q Let me ask you about the question about the third prong.
15 That's the one you wrote about in this chapter. Correct?

16 A That's correct.

17 Q The question was asked by the court before the lunch hour
18 of Dr. James about whether the most important score in the
19 case -- and I may not have this exactly right, but I think the
20 gist of it was should we be looking to the score that he got
21 around age 18, I believe that's the Popp score, because that's
22 the best assessment at the age of 18, in relation to that
23 third prong?

24 A The idea that the assessment at the age of 18 is the
25 optimum assessment is not consistent with the developmental

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1 history that we're trying to look at. When we look at
2 someone, we try to make that diagnosis of intellectual
3 disability. Eighteen was a pretty arbitrary cutoff. Really
4 it's designed historically to look at a point at a person's
5 life when they make the transition from being less dependent
6 to more independent.

7 You really want to look before the age of 18 at
8 developmental history, medical history, social history,
9 academic history, in order to make the diagnosis. There's no
10 magic relationship between a score around that age.

11 Q All right. Now, another question was, is there -- and
12 you're familiar with all the scores and the issues
13 surrounding the scores. You've read the testimony up to this
14 point?

15 A Yes, I have.

16 Q All right. And is there a magic line that we can draw
17 across the scores and say, above that line we're not going to
18 consider those scores, below that line they're all valid?

19 A Well, the answer is no. But if I may --

20 Q Sure.

21 A -- explain.

22 When you look at the scores, the first scores, the
23 scores at six and at nine, for example, are scores that we
24 probably have the least both validity and reliability. And
25 the reason why that's true is because as a child's brain

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1 develops and if I can just do this quickly without -- as a
2 child's brain develops, early on their brain is just
3 mushrooming, it's just the garden -- the rosebush metaphor is
4 really the most accurate. It's just growing in all kinds of
5 ways. That's why at five and six and seven, you're really
6 trying to pour as much into that child's brain as possible.
7 You're trying to pour language into its brain, you're trying
8 to pour mathematics into its brain, you're trying to pour
9 English usage into its brain. You're trying to pour social
10 relationships into its brain. Because the brain is just
11 exploding neurologically.

12 Now, around nine or ten the brain starts to organize
13 and neurologists actually use the term pruning in the same way
14 that you would prune a flower. And so the brain starts to
15 prune and starts to organize itself in ways that allows you
16 to -- allows that child to think more effectively, to weigh
17 and deliver it more effectively, to perhaps abstract more
18 effectively.

19 So developmentally the things that occur in those
20 first years of life are very important for the growth of that
21 brain. At the same time, it's almost impossible to
22 characterize that brain from an intellectual point of view.

23 And that's why IQ tests at six or at nine are very,
24 very unreliable. It's one of the reasons why the social
25 security manual, for example, talks about IQ tests at that age

Woods - Direct/Burt

1 not being reliable after two years. And I believe from nine
2 to 11 during -- it not being reliable after three years
3 because the brain is growing in such significant and dramatic
4 and different ways. So you can't really rely upon those first
5 scores as being stable scores that will hold for the rest of
6 your life.

7 The difficulty we have with other scores during that
8 time -- or after that time is not having enough information to
9 be able to adequately assess their value. Many of the scores,
10 we only have -- I believe Dr. Nagler's scores, Dr. Drob's
11 scores and Dr. Denney's scores that have a full set of
12 subscores that really allow us to look at them carefully.

13 The other scores, we're not as clear of, we're not
14 as sure what their value is because we can't go back and look
15 at them carefully. We can't assess them. We're not clear
16 about how the administration of those were undertaken. So
17 that becomes very difficult.

18 What we do see, however, is that even after 2003,
19 with Dr. Denney's scores, a pattern of multiple tests being
20 taken within a period of time, 1989, 1991, 1993, 1994, 1997,
21 1998, 2000, 2003, and now 2012, what this does, it confounds
22 the validity of those scores because it introduces what's
23 called practice effect. And I haven't read the material. I
24 understand that you have talked about this before.

25 Q Yeah, and let me ask you a question about that. I think

Woods - Direct/Burt

1 another question asked by the court, a good one, was, at what
2 point does the practice effect come into play, and I think
3 there was testimony by Dr. Shapiro referencing Dr. Kaufman's
4 book. Are you familiar with that?

5 A Yes.

6 Q He says at page 164: "The practice effect may not impede
7 the results of the first retest in a longitudinal study, but
8 it surely will not disappear by the third, fourth, or fifth
9 retest, and may be quite large even for elderly individuals."

10 Do you agree with that?

11 A Well, it's accurate in the sense that the practice effect
12 may not take hold early because things still may be relatively
13 novel. However, when you're talking about seven or eight
14 administrations over a period of time, including besides the
15 IQ testing, educational testing during that period, 1993 --
16 oh, in 1994, and then again in 1998, and then again in 2000,
17 you have educational testing. Aside from the IQ testing, you
18 really got the difficulty of elevated scores. Not invalid
19 scores in the sense that they are automatically invalid but
20 they're elevated, so you don't know what they really account
21 for.

22 In spite of that, when you look at both a calculated
23 standard neuro of measure and confidence intervals, these
24 scores, including Dr. Denney's score, fall within an area that
25 would make me look further to determine whether a client that

Woods - Direct/Burt

1 I was dealing with, a patient that I was dealing with, may
2 suffer from intellectual disability.

3 Q And in terms of looking further, did you do that in this
4 case, and how did that inform your judgment on prong one?

5 A Well, the prong one is not necessarily the start of the
6 decision tree. The decision tree really starts with a
7 developmental history and a social history and a medical
8 history and an academic history. If you're in a position to
9 be able to -- is that okay -- if you're in the position to
10 gather that type of information, you want to be able to look
11 at that history in as much detail as you can.

12 If you're in a position to interview family members,
13 to interview the individuals themselves on more than one
14 occasion, you know. If you look at the 1994 hospital
15 administration, there's an -- I think this is the April 27th,
16 there's an interesting line where the attending physician says
17 that there are no signs of ADHD. And the resident says there
18 are classic signs of ADHD.

19 And so what's so important is to be able to see
20 someone over time, not just once; if possible. Not just once,
21 because people change. We know that Mr. Wilson, in this case,
22 there were times when he was very young when his behavior was
23 more appropriate. We know that there are other times when it
24 was completely out of control. We know that there are times
25 when his behavior was agitation. We know that there are other

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1 times when it was withdrawal.

2 So to be able to see someone over time and to gather
3 some information, to be able to talk to family members because
4 family members have a cloak of -- so often, I don't want to
5 overstate this. But so often family members have a cloak of
6 confidence as well. They may not know what's wrong with their
7 loved one. They may not have a sense of -- they may be
8 limited themselves. They have may have difficulties. And so
9 being able to interview family members, being able to, you
10 know, see them, if possible in their own environment, being --
11 having some understanding of how intellectual disability looks
12 and not going off the layperson's, you know, Gomer Pyle or,
13 you know, idea of what it may look like and recognizing that
14 people with intellectual disability can often function in ways
15 very effectively, particularly with support, but it's the
16 deficit that counts. Having that information, being able to
17 take into that developmental history is really how you start
18 the process.

19 And then once you start the process, you do the
20 testing. Because if that --

21 Q By testing, you mean intellectual testing?

22 A Intellectual testing and adaptive functioning testing.
23 Because if you do the testing, after you understand the
24 history, after you spend some time, then you understand the
25 context of the testing. The testing then becomes informed.

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1 And that's what the AAIDD says about clinical
2 judgment, that clinical judgment must be informed, not just an
3 idea, not just an expertise, but an informed understanding of
4 the role of the family, the role of the doctors, what they
5 knew at that time about intellectual disability, etc. So
6 that's the first thing you do.

7 And in my opinion it's no different in my practice
8 than it is in a capital case. There are no higher stakes for
9 a family or a young person with intellectual disability than
10 there are in a capital case; they are the same. And you try
11 to take that type of approach, in my opinion, the same way.

12 Q Now, in this case you wrote a report which is in evidence
13 in a report dated September 7th, 2012. Correct?

14 A Correct.

15 Q And at page 3 of that report, do you set forth the
16 interviews which you conducted with family and other members
17 as of the date that this report was written?

18 A I'm going to set this aside if you don't mind.

19 Q Yes, this is Exhibit R, I'm in, first half of page 3.

20 A Page 3?

21 Q Yeah.

22 A Okay.

23 Q Does this set forth the interviews you had done as of the
24 date you did your report?

25 A Yes.

Woods - Direct/Burt

1 Q And I don't think it's reflected in your report, but I
2 wonder if you could just quickly go through these people, tell
3 us who they are, and what weight or what importance to you in
4 developing your opinions in this case on both the intellectual
5 functioning prong and the adaptive deficit prong.

6 A Sure, and I'll do it quickly. Cheryl Haddon is
7 Mr. Wilson's mother. I actually evaluated -- I'm sorry, I
8 interviewed her again in November while I've been here.

9 Ms. Haddon had her first child at 13. She has a
10 history of drug and alcohol abuse and neglected her children.
11 She's currently been -- got clean and sober for almost 20
12 years.

13 Lillian Barnes is the paternal aunt who had -- was
14 the foster mother of Mr. Wilson from five to about 15, for
15 about ten years.

16 I interviewed her on two occasions and actually
17 interviewed her again during my time here. Ms. Barnes is
18 extremely important because she had a significant role in
19 trying to get Mr. Wilson to both mental health facility --
20 mental health workers as well as interacting with the school.

21 She acknowledges that she's in fact intellectually
22 limited herself, which played some role in having other family
23 members help him when he was young with his academics.

24 Corey Barnes is a cousin who is exactly Mr. Wilson's
25 age. And he is a paternal cousin, the son of Patricia Hogan

Woods - Direct/Burt

1 Barnes. Mr. Barnes is a paralegal here in New York City.
2 They spent time together during the summers and occasional
3 weekends. They did not spend a lot of time together
4 particularly during the school year, but he was a buddy of
5 Mr. Wilson during that period, from about nine to 12.

6 Q Did you interview him again on November 14th of this
7 year?

8 A Yes, I did. I interviewed him.

9 Q Who are the other people?

10 A Rodney Wilson. Rodney Wilson is the brother of
11 Ms. Haddon. He -- I interviewed him at his home. Oh, and I
12 might add, too, that I interviewed Ms. Haddon the second time
13 at the Stapleton apartments in Staten Island.

14 I interviewed Ms. Barnes at the Queensbridge
15 projects, at her home, where she lived with Mr. Wilson. She's
16 been there since, I believe 1974. I interviewed Mr. Barnes in
17 New York City.

18 I interviewed Mr. Wilson in Delaware at his home
19 with his wife.

20 I interviewed Patricia Hogan Barnes at the home that
21 she lived in with Corey and the home that Mr. Wilson came to
22 occasionally, as I said. She have had him during -- she did
23 not have him during any time during the school year. It was
24 primarily during the summer on vacation.

25 Q And did you go back and interview her on November 17th --

Woods - Direct/Burt

1 A Yes, I did.

2 Q -- the second interview?

3 A I did. This was a telephone interview because she has
4 actually moved to Bloomsburg, Pennsylvania.

5 Q Okay?

6 A I interviewed Vanessa Lindley, who is the maternal cousin
7 of Mr. Wilson. Mr. Wilson stayed with Vanessa. I also went
8 back and reinterviewed Ms. Lindley. Mr. Wilson stayed with
9 Ms. Lindley after he got out of Brookwood, approximately 1999,
10 if I recall. And I interviewed her on two occasions.

11 I interviewed Henry Hicks, his paternal cousin who
12 is the son of Ms. Lillian Barnes. I interviewed Depetra
13 McMaster. Ms. McMaster, who lives in Redding, Pennsylvania,
14 is the older sibling of Mr. Wilson. She's ten years older.
15 She lived with him up to the time he was five and then he was
16 taken -- well, shortly before he was five, taken out of the
17 home and then taken to Lillian's -- they called her to Aunt
18 Lou's home.

19 Q Let me ask you a question about Depetra McMaster. Did
20 you -- that's his sister. Did she grow up under similar
21 circumstances as Mr. Wilson?

22 A She did grow up under similar circumstances, although she
23 had a grandmother that she lived with that provided her
24 somewhat greater stability than Mister -- but many times she
25 wasn't -- she was in fact in the same home.

Woods - Direct/Burt

1 Q There have been a lot of questions about the influence of
2 environment and culture on the scores, both in the adaptive
3 behavior realm and the intellectual functioning realm.

4 Is it of any significance reference to you to look
5 at his siblings and to see what sort of disabilities they had
6 or didn't have in assessing whether environment is the
7 explanation for Mr. Wilson's deficits?

8 A Well, Mr. Burt, this comes back to the issue of cultural
9 overshadowing, and cultural overshadowing is clearly a major
10 issue in this case. One of the things that we see is that
11 there may be some clustering within the family. There is an
12 older uncle, Henry, who appears to have developmental
13 illnesses. We certainly know that the younger son,
14 Ms. Haddon's younger son Daniel, was in special education
15 classes as well. So you wonder if in fact there may be some
16 clustering; that's one issue.

17 The second issue is we also see that family members
18 that, as far as we can tell, had intact cognitive functioning
19 and were just a step out of the -- were able to function
20 pretty effectively. Ms. McMaster is now a preschool teacher.
21 Vanessa Lindley is a very successful financial entrepreneur.
22 Corey Barnes is a paralegal with a law firm here. And so you
23 see this across the board, that it's not just culture, yet --
24 certainly from the 1950s up through the 1980s, the
25 differential diagnosis of culture was very limited.

Woods - Direct/Burt

1 Q What do you mean by that?

2 A When you look through Mr. Wilson's, particularly his
3 school records and his mental health records, you see the
4 chaos of his family which is clearly true, and the difficulty
5 of his environment which was clearly true, taken to be the
6 causative factor in his impaired functioning.

7 So you see IQ tests, for example, in 1994, where IQ
8 tests were given and the idea that he would be able to do
9 better, he should be able to do better, he probably has
10 average ability being focused on and yet there's no testing to
11 see if that's true. There's no -- it's really -- it really is
12 truly what we call overshadowing. It's one possible
13 differential, and there's no question that his family would be
14 an issue in terms of his development.

15 But when you look at someone with intellectual
16 disability, it's like -- it's like if I were to go to the
17 doctor and say that I have chest pain and the doctor were to
18 do an EKG and the EKG was normal, and he then said, well, you
19 know, you don't have chest pain or your chest pain must come
20 from you eating too much, he would ignore the other 47 reasons
21 for chest pain. And that's exactly, in my professional
22 opinion, what happened here, was that the other potential
23 reasons for Mr. Wilson's behavior was not delved into and was
24 not looked at carefully. The options other than conduct
25 disorder or a mental health problem were not looked into.

Woods - Direct/Burt

1 Q Is it also true that at any point in time that some
2 professional is making a prediction, for instance, does an IQ
3 score and says, I think he's got greater potential, that they
4 do not have the benefit as you do of what happens down the
5 line from that point forward?

6 A Well, retrospection is great. That's one of the
7 benefits, is I'm able to look at the medical records of his
8 bacterial meningitis when he was 18 months, and a PET scan
9 that is consistent with his bacterial meningitis. We know
10 that PET scans are sensitive without being specific. And what
11 that means is that they tell you something's there, but they
12 don't tell you what it is.

13 But when you've got a history of bacterial
14 meningitis at 18 months, when you've got a PET scan now, when
15 you've got this long history of behavior that is not only
16 aggressive, that is not only agitated but at times bizarre and
17 impaired and not responsive to psychiatric intervention, it
18 tells you that perhaps there's something else that we should
19 be looking at.

20 Q And you're referring to the attempts to medicate him from
21 age seven up to age 14?

22 A Yes.

23 Q Including with Ritalin, Thorazine?

24 A Well, when you look at the history of his medications,
25 you see him being prescribed -- for example, you see him being

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1 prescribed Benadryl. Benadryl is not a psychiatric
2 medication. There are no psychiatric indications for
3 Benadryl. And benadryl taken the way he was taking it,
4 intramuscularly, it's what's called an anticholinergic, its
5 not -- it's something that dries you out, it's something that
6 people often use when they have allergies or that type of
7 things. It's very sedative.

8 So in his case it was being used to attempt to
9 sedate him. He was also given Mellaril. Mellaril is an
10 antipsychotic medication. There are no indications during his
11 entire record that he was very psychotic. In fact, when you
12 look at the mental status examinations in the three
13 hospitalizations, it's very clear that he in fact was not
14 psychotic.

15 So what you're seeing is a child being medicated
16 with medications in an attempt to control symptoms, behaviors
17 that they see. I'm not -- I'm not faulting the practitioners.
18 They obviously are dealing with someone that was having
19 extraordinary difficulties, and difficulties not only within
20 the environment but to themselves as well, who at the age six
21 was talking about being suicidal. And so -- but nevertheless,
22 what was missing was a broader differential diagnosis.

23 Q Now, when you wrote your report, you -- the report was
24 filed simultaneously so you did not have the benefit of the
25 government's reports to be able to take those into account in

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1 forming your opinions. Correct?

2 A That's correct.

3 Q Since you wrote your report, have you had the chance to
4 actually review the three reports filed by the government's
5 experts, that is Dr. Denney, Dr. Mapou, and Dr. Patterson?

6 A Yes, I have.

7 Q Let's look first of all at Dr. Patterson's conclusions
8 because he, like you, is a psychiatrist. Correct?

9 A That's correct.

10 Q All right. And we'll hear from this, I'm sure very
11 shortly, he diagnosed an Axis I -- four Axis I disorders:
12 "Number 1, Conduct Disorder by history; "Oppositional Defiance
13 Disorder, by history"; number 3, "Attention Deficit
14 Hyperactivity Disorder, by history"; and 4, "Learning Disorder
15 NOS."

16 And then on Axis II, he diagnosed "Antisocial
17 Personality Disorder with Narcissistic Features (primary)."

18 Do you agree with that diagnosis?

19 A No, I'm sorry I don't agree with those diagnoses.

20 Q And could you explain why?

21 A Well, I think that the -- as you noted and Dr. Patterson
22 noted, that the initial diagnosis of cognitive disorder and
23 oppositional defiance disorder and ADHD are historical
24 diagnoses.

25 And there is absolutely no question that Mr. Wilson,

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1 during his developmental years, had conduct that was out of
2 control. There's no question that he also had behavior that
3 was oppositional.

4 It's also clear during his history that he had
5 symptoms that would appear to be consistent with ADHD. He was
6 distractable. He had difficulty focusing. He had difficulty
7 being able to follow academically. He was disruptive in
8 groups. He was disruptive in school. So all of those were --
9 were there.

10 The difference, however, is that they weren't the
11 whole picture. We also see during that period of time that
12 Mr. Wilson, at the age of 15 -- 14, I'm sorry -- attempted to
13 put his desk in the closet of a classroom that he had -- I
14 think this was the Loretta school. That he was just --
15 actually, I'm sorry, he was 13 -- that he was just going to
16 and he was moving his desk into the closet closing the door.

17 When Mr. Wilson was very young, he had unusual
18 behavior that included standing in the middle of the street
19 when cars were coming. He also refused to leave the school
20 when he was -- when there was a potential fire that was
21 occurring. This behavior is not consistent with conduct
22 disorder or not consistent with oppositional defiance
23 disorder. There's -- there's more to it that's going on.

24 So you have to take those into consideration. You
25 have to take his conduct in consideration, you have to take

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1 the oppositional behavior into consideration, but you want
2 to -- there are other behaviors that you also have to look at
3 to try to determine accurately what's occurring.

4 Q Are you familiar with a book that's cited in the green
5 book call Diagnostic Manual - Intellectual Disability: A
6 Textbook of Diagnosis of Mental Disorders in Persons with
7 Intellectual Disability?

8 A Yes.

9 Q And theres's a companion, clinician's guide that goes
10 along with it?

11 A Yes.

12 Q What is the purpose of these two books in terms of the
13 issue we're talking about now?

14 A The purpose of those two books -- and the manual came out
15 in 2008, 2009. And it's a manual that is just like the
16 Diagnostic and Statistical Manual for mental disorders except
17 it's for mental disorders that occur within the context of
18 people that have intellectual disability. So these are called
19 comorbid disorders. Now, what comorbidity disorders mean,
20 these are disorders that happen at the same time. Bipolar
21 disorder and substance abuse, schizophrenia and posttraumatic
22 stress disorder, these are disorders that occur at the same
23 time.

24 You know when you go to your doctor and he says,
25 well, you know, your asthma is under control and your type 2

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1 diabetes, you probably need some help and, you know, we need
2 to do some cardiac workup on you and how's your hypertension,
3 we don't really think about it. He's already named three or
4 four disorders there. But for some reason in psychiatry, we
5 tend to look at -- we look at one diagnostic entity. They're
6 either intellectually disabled or they are either depressed
7 and that's not the way it works in the real world.

8 Q This book is organized around disorders other than
9 intellectual disability. Correct? Are they trying to give
10 cautions to clinicians who are diagnosing these other
11 disorders with people who have intellectual disability?

12 A That's correct. And other -- that's correct.

13 Q And there is a specific chapter on attention deficit and
14 disruptive behavior disorders?

15 A That's correct.

16 Q And you relied on this guide and the containing manual
17 when forming your opinions?

18 A Yes.

19 Q Page 82 says -- this is the chapter on attention deficit
20 and disruptive behavior disorders. Those are the disorders
21 that Dr. Patterson cites that Mr. Wilson has been diagnosed
22 with by history. Correct?

23 A Yes.

24 Q It says: "Even more careful consideration is required
25 when diagnosing a disruptive behavior disorder in individuals

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1 with intellectual disability. In this population, challenging
2 behavior has a high prevalence and is often the main reason
3 for referral. On the surface, the behaviors can resemble
4 those associated with disruptive behavior disorders. The
5 clinician needs to consider whether the behaviors are typical
6 for the individual's age group, bearing in mind the child's or
7 the adult's developmental level and that these diagnoses have
8 historically been designed primarily for children. Moreover,
9 in the case of conduct disorder there is also a need to
10 establish whether the individual has an understanding of
11 appropriate social norms and whether intent can be
12 ascertained."

13 Do you agree with that statement?

14 A Well, I particularly agree with the question of intent.
15 If you look through the records, you see that there are times
16 when Mister -- particularly as he gets older, his behavior is
17 more intentional. However, in those young records, in his
18 youth, particularly at seven, eight, nine, and ten, you see
19 that there are periods where they say that he strikes out for
20 no reason. He hits someone for no reason. That there's no
21 goal directed or intentional behavior that occurs. They find
22 him lying on the floor in the school in a fetal position. And
23 time after time you see both in goal directed as well as
24 behavior, that is in fact not goal directed. That seems to be
25 impulsive.

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1 And those are the kinds of behavior that you want to
2 look at and the kind of distinction you want to make to come
3 to some understanding of exactly what's going on with this
4 young man.

5 Q Now, in terms of the interviews that you were focused on,
6 going through I think the family members, but did you also
7 have available to you multiple interviews in some cases where
8 many of the care providers who -- who filed or composed
9 records regarding Mr. Wilson?

10 A Yes.

11 Q What did you learn from those people that were important
12 to your analysis here?

13 A Well, I thought one of the most telling series of
14 interviews, there were two interviews, was with Joyce
15 Guerrero.

16 Q And who is she?

17 A Joyce Guerrero is actually a licensed clinical social
18 worker as well as a master in social work. And she saw
19 Mr. Wilson for -- at first I thought it was seven years. In
20 fact, it was nine years. She corrected me. Because most of
21 the records as we look at them are -- are incorrect. She did
22 start seeing Mr. Wilson at the psychiatric -- neuropsychiatric
23 facility, but had actually been seeing him for two years
24 before that. She had been seeing him at Queensbridge where
25 his aunt was located for two years. So she actually saw him

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1 for a total of nine years.

2 And I would agree with that Dr. Mapou, I think where
3 he describes her as one of the most important people in terms
4 of being able to evaluate Ronell Wilson.

5 She describes him in both the first and second
6 interviews --

7 MR. McGOVERN: Objection.

8 THE COURT: Yes.

9 MR. McGOVERN: What's appears to be happening here
10 is they're going to offer the hearsay statements of Joyce
11 Guerrero about whatever care she provided to the defendant
12 during the period of time that he was either at Queensbridge
13 or Queens neuropsychiatric centers. That's -- it is perfectly
14 okay to rely on hearsay when you're -- when you're offering
15 expert testimony under Rule 702 or whatever the rule is. But
16 to just wholesale take the word of an informant about this
17 information and just blow it into the record is inappropriate.

18 Certainly he can rely on her -- on her statements
19 but to recount what started to sound like two interviews with
20 her is problematic. And I don't make that objection lightly,
21 your Honor, because, look, they've been doing -- they've been
22 doing this throughout the hearings, saying what one person
23 said, one person didn't say.

24 And I know it's up to the court to decide, but with
25 Ms. Guerrero in particular, someone who we've actually had

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1 contact with, we have serious concerns about Ms. Guerrero's
2 credibility as a witness in any regard. So we're a little bit
3 more sensitive to Ms. Guerrero. Ms. Guerrero was under
4 subpoena. We served her with a subpoena. She freaked out
5 when she found out she was being subpoenaed. She told us what
6 we, at least to our mind, told us incredible tales about how
7 the ATF was harassing her by giving her a subpoena. She's
8 told us that she's met with you on one occasion during the
9 last trial. She told us she was here for the sentencing
10 hearing the last time the case was around. We have absolutely
11 no information that would corroborate that.

12 So I throw these things out just to say this isn't a
13 typical situation where we can say well, you know, it's just
14 another caregiver. This is a woman who has serious questions
15 about her credibility that we would -- we would -- I'm sure
16 the defense would believe her. But we have things that we
17 want to question her about. To put her testimony or her
18 statements in, in such a wholesale fashion is inappropriate.
19 I think it would violate *Mejia*, which is I think a Second
20 Circuit case that talks about just putting an expert witness
21 on and establishing his expertise strictly through the hearsay
22 and other informants who aren't available.

23 But beyond that, we have so many questions about her
24 and the things that she said. I mean, I just so the court is
25 aware, at some point during an initial meeting with the

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1 defendant, Ms. Guerrero said the defendant suffered from
2 moderate mental retardation. That means that he would have
3 been consistent with somebody who was well below a 55. So,
4 obviously, that's the sort of information that one might see
5 as being inflammatory were it to come up in this hearing
6 because it's without any basis. So we would ask that the
7 defense be directed not to elicit testimony as to what
8 Ms. Guerrero may or may not have said.

9 MR. BURT: Sir, I think what counsel just said is
10 what's known in the trade as a speaking objection, a very long
11 speaking objection, the purpose of which was to get before the
12 court his view of the credibility of Ms. Guerrero. And of
13 course, he's certainly free to advance the evidence or through
14 questioning the points he was making with the court. But all
15 of the experts in this case, including the government's
16 experts have made extensive reliance on out-of-court
17 informants. For instance, the first person that Dr. Denney
18 interviewed was a government informant.

19 So both sides could have a lot to say about the
20 credibility of the information. I don't think either side is
21 in a position to critique the experts for relying on
22 out-of-court informants, because it's proper to do so and
23 whatever weight the court wants to give it, I think can be
24 informed by evidence. Of course, the statements of counsel
25 are not evidence. If the court hears the kind of factual

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1 information that was just conveyed by Mr. McGovern, then
2 certainly it's entitled to discount that information. But I
3 think all of this goes to the weight, not the admissibility of
4 any reliance that Dr. Woods or anybody else places on
5 out-of-court informants.

6 THE COURT: Well, the problem is on the one hand
7 both sides are relying on out-of-court informants. Okay. On
8 the other hand, if it can be demonstrated that an out-of-court
9 informant has a major bias problem or a major psychological
10 problem and if the witness is relying on that person's
11 comments or representations to reach a conclusion, then it may
12 skew the conclusion. And what the court needs is a fair
13 estimate of an expert's analysis based on reliable
14 information.

15 If it's not reliable, this expert has no -- it makes
16 it more difficult for the expert to come up with a set of
17 observations that are valid. And I think that's really the
18 problem. Now, I don't know this Ms. Guerrero, she may have
19 shown up at a hearing and think she's had a conversation with
20 me. Any conversation had with anyone on this case since the
21 day it was assigned to me was placed on the record,
22 everything. There's no such thing as an off the record
23 conversation about this case. Never will be in a criminal
24 case in my court.

25 So I don't know what this is all about. I just

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1 don't know how to deal with the objection or the commentary.
2 But I'll invite the government if they wish to make a further
3 submission to make it. But the risk is, and I'm going to let
4 you go forward, but the risk is that some of what Dr. Woods is
5 talking about may be tainted if I find that the source of the
6 information that's he's relying upon is not reliable. And
7 that's my concern.

8 MR. BURT: Sure.

9 THE COURT: Because I expect that Dr. Woods is
10 making a fair, reasoned, professional assessment, whether you
11 agree with it or not, about certain -- and reaching certain
12 conclusions based on the assessment.

13 But if we find that some of these sources are
14 unreliable, then it affects the -- it affects the court's view
15 of the assessment.

16 So that's the risk it's taking. But you can go
17 ahead. I don't know this person, so I heard what counsel said
18 and if there's something more to be added, I'm sure he will
19 provide it to us.

20 MR. BURT: Thank you, your Honor.

21 Q First of all, Dr. Woods, identify who Ms. Guerrero is in
22 relation to Mr. Wilson. Where did she work and what contact
23 did she have with him?

24 A Ms. Guerrero was a therapist for Ronell Wilson. She was
25 a therapist, like I said, a licensed clinical social worker

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1 and a master's in social work that worked both at the
2 Queensbridge project area as well as the Queens
3 Neuropsychiatric Institute. She worked at the Queensbridge
4 project for at least two years, and then worked with
5 Mr. Wilson for another seven years after that.

6 Q Now, when did you interview her datewise?

7 A The first time that I interviewed her was August 7th,
8 2012.

9 Q And roughly what period of time did she have counseling
10 responsibilities with Mr. Wilson?

11 A From the time that he was about five to about the time
12 that he was 13 or 14.

13 Q And during the course of her contact with him, was there
14 contemporaneous documentation of her observations and
15 conclusions?

16 A Yes.

17 Q Were you able, before you even interviewed her, to review
18 the comments that she was making in writing in Mr. Wilson's
19 records?

20 A Yes.

21 Q The fact that her observations were captured
22 contemporaneously with whatever it was she was observing, did
23 that play some role in whatever weight you were placing on her
24 observations?

25 A Yes.

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1 Q Was there consistency or inconsistency between what she
2 was telling you in 2012 and what she wrote back during the
3 time when she was dealing with Mr. Wilson?

4 A There was consistency in terms of her clinical
5 presentation. There were inconsistencies in terms of why she
6 made the transition of diagnosis from -- it first started out
7 as mental retardation moderate, and then it went to a
8 diagnosis that implied brain damage. I can't remember if it
9 was cognitive disorder secondary to brain disorder. And then
10 it went to -- there was also an adjustment disorder and an
11 ADHD diagnosis in there as well.

12 Q Is counsel correct that at one point there was a mental
13 retardation?

14 A That was her initial diagnosis in 1991, moderate mental
15 retardation in 1991.

16 Q All right. Now, when you interview someone like
17 Ms. Guerrero, do you assess credibility when you're doing the
18 interview?

19 A Yes.

20 Q Is that one of the purposes why it's important to have to
21 do a face-to-face interview?

22 A Yes, particularly -- well, in this case it was over the
23 telephone. But to talk with them to try to gain some
24 understanding of what their expertise is, did she have a
25 background with children. Did she -- she practiced for a

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1 significant period of time, at least during nine years. So
2 that was one of the things that I did try to evaluate.

3 Q And in assessing the goodness of the information that she
4 was giving you both in person and in the records, do you also
5 take into account whether that information is consistent with
6 that other information you're getting from other records and
7 other sources?

8 A In Ms. Guerrero's case, it was very important that I try
9 to cross-reference the information that she was giving me
10 along with what other people were saying, Aunt Lou, other
11 family members.

12 Q And explain to me why it was important in her case?

13 A Because as someone that does psychotherapy themselves,
14 you only see someone for a short period of time. Even though
15 you see them over time, you see them at best for perhaps an
16 hour a week.

17 So, in her case she did have the opportunity to see
18 Aunt Lou, she had the opportunity to see Uzziah.

19 Q Who is that?

20 A Uzziah is Mr. Wilson's older brother. And she also
21 actually started out seeing both Uzziah and Mr. Wilson
22 together. She had the opportunity to interact with the school
23 to some degree.

24 So I did have the opportunity to listen to what she
25 had to say and compare it to what others said as well.

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1 THE COURT: Is what she had to say in August covered
2 in your September opinion letter?

3 THE WITNESS: I think so, your Honor. Let me see.
4 Aspects of it are, your Honor. On page 19, for example, it
5 says Ms. Wilson -- oh, Ms. Guerrero reported she had to
6 separate Mr. Wilson from his older brother Uzziah in therapy
7 because Uzziah could direct Mr. Wilson not to talk with her
8 and Mr. Wilson would comply. Once separated, this behavior
9 was dramatically increased -- or decreased.

10 THE COURT: And then you interviewed her again?

11 THE WITNESS: Yes, Your Honor.

12 THE COURT: When?

13 THE WITNESS: This month, November -- it was about
14 November 20th, I believe.

15 THE COURT: Why?

16 THE WITNESS: Because my first interview I didn't
17 feel as though it was complete.

18 THE COURT: You know, we can keep the record open
19 until the millennium, the next one. I have a report here.
20 You included her -- your report reflects your conversation
21 with her. And now we've got you're going back to her. I
22 mean, my problem is, where does it end? You reached a
23 conclusion and now you're going back to her. And with all due
24 respect, I've got your report here, you know, it's very
25 detailed, and I appreciate it. But the idea that, you know,

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1 you go back to somebody and now we're putting this before the
2 court, it's like an addendum to your report and it just seems
3 it's after the fact.

4 Why are we doing this? Why am I having to listen to
5 post-report reports in this case? You know, there's got to be
6 an end to the process and I've got to have -- we've got to
7 have closure at some point. This has been going on a long
8 time.

9 I extended the time for the hearing. This report
10 was issued in September. It's now December. The only thing
11 that I asked was that the parties on direct question
12 witnesses, expert witnesses as to issues that have arisen that
13 had been brought to their attention by the court since the
14 reports were completed. That's what I asked for. I didn't
15 ask for everyone to run back to shore up or to or to extend or
16 to particularize the views of anybody after the fact. There's
17 plenty here. We could spend a year going through this
18 material.

19 You have more questions for the witness?

20 MR. BURT: Yes.

21 BY MR. BURT

22 Q Dr. Woods, just to end this and move on to the last area
23 I want to get to. Was the general purpose in going back and
24 interviewing people because you had not seen the reports of
25 the government experts when you filed your report and there

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1 were certain issues that came up that you wanted to clarify,
2 or was there other purposes?

3 A That was the primary reason.

4 Q Okay. Let me move on to another topic.

5 THE COURT: Well, you could have asked it in a
6 different way and not in a leading fashion. I don't like it.

7 MR. BURT: I apologize your Honor.

8 THE COURT: Because it's trickery, counsel.

9 MR. BURT: Trickery?

10 THE COURT: Yes, it's call trickery. You put the
11 idea in his mind for him to answer yes, so that it would
12 justify the fact that he went back. Because the court raised
13 the issue. Your question should have been, could you explain
14 to the judge why you went back. That's the question. I could
15 have -- I learned that in grade school, not even in law
16 school. It's not fair. It's not right. And I've given you a
17 lot of latitude here.

18 MR. BURT: I appreciate it, your Honor.

19 THE COURT: But the question is, isn't the reason
20 why you went back because what you read somewhere, the
21 question is, could you explain to the judge why you went back.
22 He probably would have given the same answer. But now I don't
23 know whether to believe him because you put the answer in his
24 mind. Is that what you wanted with me --

25 MR. BURT: No, your Honor.

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1 THE COURT: -- that I not believe him.

2 MR. BURT: No, your Honor.

3 THE COURT: That's what happens in a situation like
4 that. That's the potential. It's not fair to him, it's not
5 fair to me. It's just not fair. Really. I spent five
6 minutes talking to you about this and then you went and did
7 that.

8 MR. BURT: Your Honor, I apologize.

9 THE COURT: It's really not right.

10 MR. BURT: Your Honor, I --

11 THE COURT: I don't want apologies, I just want
12 compliance. I don't need apologies. This isn't about my ego,
13 this is about getting the job done right.

14 MR. BURT: Your Honor, could I address two other
15 issues with the witness?

16 THE COURT: Sure, go ahead.

17 MR. BURT: Thank you.

18 Q One of the questions that the court asked one of the
19 other witnesses is, the basic one, what is the difference
20 between intellectual disability and mental illness. Could you
21 explain that?

22 A Yes. Intellectual disability is not a mental illness or
23 a mental disorder. It is a disorder of brain function and
24 adaptive function, environmental function. A mental disorder
25 is separate and it can be a thought disorder, meaning

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1 someone's thinking is inappropriate or a mood disorder,
2 meaning there's disruption of their mood. But it is not in
3 the -- an intellectual disability is not in the same category.

4 People that have intellectual disabilities often
5 develop certain types of psychiatric disorders. If you are
6 intellectually disabled sometime in your life, you may well
7 meet the category where -- yeah, the category of depression,
8 or you may well find yourself anxious. But they are separate
9 entities. So a mental health disorder is separate from an
10 intellectual disorder.

11 Q Now, you know from --

12 A Intellectual disability. I'm sorry.

13 Q Have you been informed that there are some e-mails, large
14 amount of e-mails that Mr. Wilson wrote while he was in
15 custody?

16 A Yes.

17 Q And could you tell the court what impact, if any, that
18 has on your opinion here?

19 A I've had the opportunity to look through quite a few of
20 the e-mails, not all 7,000, but I've had an opportunity to
21 look through quite a few e-mails. Even these e-mails are not
22 unusual with some -- and the quality of the language is not
23 unusual with someone that has intellectual, mild intellectual
24 disability.

25 One of the things that we see is that people that

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1 have mild intellectual ability often are able to use
2 technology, to utilize technology in ways that help them look,
3 quote, more normal. Mr. Wilson, for example, described to me
4 how he would use -- how he would use spell checking on his
5 e-mail in order to make sure that his spelling was right and
6 to be able to look at his language.

7 So the idea that someone is able to send e-mails, we
8 already know that the AAIDD makes it clear that verbal
9 language is not something that should be taken into
10 consideration. So the idea that someone is able to use e-mail
11 or to use social technology in order to -- in order to
12 communicate and function is really not inconsistent at all
13 with mild intellectual disability.

14 Q Now, since you wrote your report, did you at my request
15 go back and review what are called the Kel transcripts?

16 A Yes, I did.

17 Q And did you also take a look at some of the guilt phase
18 testimony in the case?

19 A Yes, I did.

20 Q And could you tell the court in what way, if any, that
21 impacts your opinions here?

22 A I -- I looked at the Kel transcripts. I also read the
23 Second Circuit opinion. I also read the sentencing, your
24 Honor. I also read the testimony of Mr. Jacobus, I believe I
25 have that correct, and Mr. Diaz.

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1 And I must -- I'd like -- I must preface this by
2 saying that this is normally not material that I would take
3 into consideration because the AAIDD suggest that, or
4 recommends that material within the context of a criminal act
5 or criminal acts should not be considered because you don't
6 know exactly, you can't nail it down. And even though -- and
7 that was certainly true here. But some things came out very
8 clear, and I want to point those out.

9 First of all, you know, in this kind of incredibly
10 horrific circumstance, we see a couple of things. Number one,
11 we see Mr. Wilson both giving direction, we see him both
12 literally directions to get around in this very circumscribed
13 area of Staten Island but also directions to pat someone down.
14 So he's clearly giving those directions. There's no question
15 about that.

16 Are those inconsistent with Mr. Wilson particularly
17 as mild mental retardation or mild intellectual disability?
18 Absolutely not.

19 When you look at the directions that he is giving,
20 when you look at the driving directions that you listened to
21 Mr. Jacobus, he describes him walking back from the auto, the
22 car back to Stapleton. And he describes it as a short walk.

23 You also see that Mr. Diaz describes a taxicab,
24 taking a taxicab driver when they're kind of looking, he and
25 Mike Whitten kind of looking for Mr. Jacobus and Mr. Wilson.

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1 Again, it's within their relatively circumscribed area.

2 There's no reason why Mr. Wilson would not be able
3 to find his way around that area. And this is really -- if I
4 may, this is really the difference between seeing someone that
5 has intellectual disabilities when they're eight or nine years
6 old and seeing someone that may be older, 19, 20 years old.
7 You see some development. It's not that people that are --
8 intellectually disability, it's not that they can't learn,
9 it's that they tend to learn slower and often with repetitive
10 help, they're able to improve. As we have seen his academic
11 scores improve to some degree.

12 So the behaviors that you see in those -- in that --
13 in those tapes and in the testimony is not inconsistent with
14 the possible strengths that someone that has intellectual
15 disability might have. The problem, however, is that
16 intellectual disability is defined by the deficits, not by the
17 strengths.

18 And when you look at the deficits in those, both in
19 the tape, but particularly in the testimony, you see a number
20 of things. Number one, Mr. Diaz says that Mr. Green and
21 Mr. Whitten, and I'm going to say Omar and Mike, because I
22 think that's -- that was their name, that they were the ones
23 that said they were going to get Ronell to do the robbery.
24 That's what Mr. Diaz says in the testimony, that they were
25 going to get Ronell to do the robbery.

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1 They talk to Ronell about the robbery. He said they
2 say to him, in the testimony, and both Mr. Jacobus and
3 Mr. Diaz asked him, do you want to do it. He defers to them
4 and says -- and I'm going not saying directly, but in the
5 testimony, says, if you want me to do it, I will, I will do
6 it.

7 You see other circumstances, as Mr. Jacobus
8 describes, of an earlier situation where they are considering
9 robbing a store and it's -- it's a clothing store. And
10 Mr. Jacobus described Mr. Wilson renting a truck, which is
11 impossible because he did not have a driver's license. But
12 still, that he was renting a truck and they were going to rob
13 this store, this was Mr. Wilson's idea, they were going to rob
14 the store in broad daylight.

15 Omar Green and the rest of the group talked
16 Mr. Wilson out of doing that. They explained to him,
17 according to Mr. Jacobus, what a bad idea it was to rob a
18 store, pull up in front in a rental car, wrap up the clothes,
19 throw them in the truck and take off in broad daylight. And
20 in spite of them talking about this, Mr. Wilson continued to
21 want to do it. They did not do it.

22 The part that I see as being so directly relevant to
23 deficits rather than strengths, and within this incredibly
24 tragic situation, I know that's very difficult to take into
25 consideration, is Mr. Wilson and Mr. Jacobus are walking back,

Woods - Direct/Burt

1 according to Mr. Jacobus, after shooting two policemen to
2 death, moving the truck, moving the car, taking the bodies out
3 of the car, getting a gun from the crime scene, Mr. Wilson
4 putting the gun in his waistband apparently, and they're
5 walking back to Stapleton.

6 When they get to -- when they get to Stapleton,
7 Mr. Jacobus said, and again, I'm not saying this is accurate,
8 I'm just repeating his testimony, and that's what makes this
9 so difficult, Mr. Jacobus himself acknowledged that he was in
10 special education when he went to the tenth grade. That when
11 they get to Stapleton there is a blue and white police car, I
12 think they called it a paddy wagon that was driving down the
13 road. And Mr. Wilson, just coming from having committed two
14 murders, well known in the community with a gun in his
15 waistband, according to Mr. Jacobus, in a loud, and I believe
16 the words he used was loud and raucous, says -- yells out to
17 the police something like: Can you -- have you found who
18 you're looking for?

19 My first article on intellectual disability with
20 Mister -- with Dr. Greenspan was about risk awareness and risk
21 unawareness. And it posits that one of the core symptoms of
22 intellectual disability is an inability to accurately assess
23 one's own risk, the consequences.

24 It's very understandable to be able to say
25 Mr. Wilson was a violent guy. There's no question about it.

Woods - Direct/Burt

1 Mr. Jacobus describes him as the most violent of his group.
2 It's also interesting that Mr. Jacobus describes him as being
3 a core member of the group, although in the second opinion,
4 Second District opinion they described Mr. Wilson as being in
5 the group but an associate.

6 Nevertheless, at this point in his life, after
7 murdering two undercover policemen, after being aware that
8 there are other undercover policemen in the area, that
9 Mr. Diaz says, don't worry about it, they're here all the
10 time. He's walking down the street, he sees a paddy wagon.

11 THE COURT: I've heard it before. You've said it
12 over and over again and that is a wonderful rendition of
13 selective recollections and, really, that's fabulous. I
14 really think that's a wonderful rendition of subjective
15 recollections of a trial that you know next to nothing about.

16 You have any other questions for this witness before
17 I let the other side question him?

18 (Continued on the next page.)
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Woods - Direct/Burt

1 THE COURT: Do you have any other questions for this
2 witness before I let the other side --

3 MR. BURT: One more.

4 THE COURT: -- question him?

5 I'm deeply troubled that you ask the witness to give
6 a version of what happened at the trial that is incomplete at
7 best. I'd like to concentrate on the issue at hand.

8 Do you have other questions? I want to know what
9 questions you have for him because I don't want to hear any
10 more from this witness but, you know, his perception of
11 something he had really has very little understanding of.

12 MR. BURT: Your Honor, there are two questions I
13 have for the witness is whether he informed in his opinions on
14 the three prongs is relying --

15 THE COURT: Oh, we're going to get to that?

16 MR. BURT: Is relying on any particular piece of
17 information, or whether its based on the entirety of the
18 information he had.

19 THE COURT: Ask him the question.

20 EXAMINATION BY

21 MR. BURT:

22 (Continuing.)

23 Q Doctor, you said before that you formed an opinion on all
24 three prongs here; correct?

25 A Yes.

Woods - Direct/Burt

1 Q Is your opinion based on any particular interview or
2 piece of information from the records or analysis of the crime
3 or the trial transcript, or how would you characterize what it
4 is you're relying on in forming your opinions?

5 A My opinions were, my opinions were set at the time of my
6 report. And consequently, that is what my basis or the basis
7 is -- the materials that I had at that time, there's nothing
8 that has come since that time that has altered my opinions at
9 all.

10 Q And could you characterize for us the strength of the
11 evidence in terms of comparing to other cases where you've had
12 background information?

13 Is this a case where you have insufficient
14 information or how would you characterize it?

15 A I think in this particular case, the information is very
16 strong because Mr. Wilson lived a documented life from the
17 time of five, certainly, through the time of even through
18 today. Mr. Wilson's life has been well documented and
19 certainly during that important period, the developmental
20 period, it was very, very well documented.

21 MR. BURT: Thank you. That's all I have, Doctor.

22 THE COURT: Take a ten-minute break.

23 (Defendant exits from courtroom at 3: 25 p.m.)

24 (A recess in the proceedings was taken.)

25 THE COURT: How much time for cross?

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1 MR. McGOVERN: Maybe an hour.

2 THE COURT: Okay.

3 (A recess in the proceedings was taken.)

4 THE COURT: Please be seated.

5 Mr. McGovern, you can sit down for a moment.

6 MR. McGOVERN: Oh I'm sorry.

7 THE COURT: That's okay.

8 (Defendant enters the courtroom at 3: 38 p.m.)

9 THE COURT: I'm striking the answer to the

10 question that was asked by counsel about the Kel tapes. If
11 you want to ask the witness a focused question about the Kel
12 tapes, you can do it. If you want to ask him his conclusion
13 about something, you can do it. But there's to be in
14 discussion of what other people said.

15 There's to be no discussion about what I wrote in my
16 sentencing memorandum. There's to be no discussion about what
17 the Second Circuit did or did not do. Those are legal matters
18 that have nothing to do with this witness and are outside the
19 scope of his expertise. So if you want to ask him a
20 question -- the question that I asked then you can ask to.

21 Do you want to ask it, go ask to, please.

22 MR. BURT: Sure, thank you.

23 DIRECT EXAMINATION

24 BY MR. BURT:

25 Q Dr. Woods, have you reviewed the Kel tapes?

Woods - Direct/Burt

1 A Yes, I have.

2 Q Can you tell the Court what, if any, impact the Kel tape
3 or Kel tapes have on your opinion?

4 A The Kel tapes did not change my opinion that Mr. Wilson
5 was mildly and mentally retarded.

6 Q Can you explain why?

7 A I believe the tapes reflect behaviors in terms of giving
8 directions, et cetera, that would be consistent with mild
9 mental retardation.

10 MR. BURT: Thank you.

11 THE COURT: Thank you very much. All right.
12 Cross-examination.

13 MR. McGOVERN: Thank you, your Honor.

14 CROSS-EXAMINATION

15 BY MR. McGOVERN:

16 Q Hello again, Dr. Woods.

17 A How are you, sir.

18 Q I'm okay.

19 Doctor, one of your last series of answers had to do
20 with why it was that you went back to Joyce Guerrero and some
21 other folks to reinterview them.

22 Do you remember that?

23 A Yes.

24 Q Okay.

25 And the way the question came out, and the way you

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1 answered it, sounded like you went back to interview these
2 people because you had questions based on information that the
3 Government had presented in its reports.

4 Is that what your testimony was?

5 A Yes.

6 Q But the truth of the matter is, Doctor, that Joyce
7 Guerrero was not interviewed by the Government; right?

8 A They attempted to, yes, but they did not.

9 Q So your testimony here that you went back to interview
10 Joyce Guerrero to somehow clarify the position because of
11 something you saw in the Government's reports is, lets just be
12 kind, untrue?

13 A Well no, sir. No, that's not correct. If you look
14 through the Government reports, Dr. Mapou says that
15 Ms. Guerrero was the person that -- was the person that saw
16 Mr. Wilson more than anyone else. I did not have that before
17 I wrote in my report.

18 Q But --

19 A May I finish.

20 Q Yes.

21 A Mr. Mapou also said that there was changes in, as
22 Dr. Denney did, there was changes in her diagnosis from
23 moderate mental retardation on. And I had wanted to ask her
24 why those changes were made. So it was completely related to
25 the information. I wouldnt have had to otherwise.

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1 Q But all of that information was in the records that you
2 were supposedly reviewing before you did your own report;
3 correct?

4 A Why it was changed was not in the record.

5 Q But you had no information that the Government had
6 interviewed her; correct?

7 A That's correct. But that's --

8 Q I'm just going to ask yes-or-no questions and if you can
9 stick with the yes or no or not that would be great.

10 A Okay.

11 Q Okay.

12 But based on your review of the Government's
13 reports, it was clear to you that the Government had not
14 interviewed her, correct or not correct?

15 A That's correct.

16 Q So any question about why she changed the diagnosis or
17 why she initially had a diagnosis was something that was
18 within the records that you were supposedly reviewing before
19 you ever issued your report; correct?

20 A That's not correct.

21 Q So --

22 A And may I?

23 Q Go ahead.

24 A May I expand?

25 If you look at the Government's reports, they talk

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1 about her ordering neurological tests. They talk about her
2 this transition of diagnosis from moderate mental retardation
3 to ADHD to adjustment disorder, right? Those were questions
4 that I wanted to be able to ask her specifically based upon
5 what was in the Government's report.

6 Q So why didnt you ask her about those things when you
7 initially saw that she had changed those diagnoses in the
8 manner that she did during your initial review of this case?

9 A Because when I talked to Ms. Guerrero the first time, I
10 talked to her for 45 minutes and I was not in able to complete
11 my evaluation with Ms. Guerrero. I called her numbers of
12 times before that trying to complete my evaluation and she
13 would not talk with me.

14 Q That's right because she said that people were showing up
15 at her house; correct?

16 A She said that the officers were showing up at her house.

17 Q She said that agents had showed up at her house and given
18 her a subpoena to appear at this hearing; correct?

19 A She said that officers had shown up, yes.

20 Q And that's because of that subpoena her good name was
21 being ruined in whatever little town she lives in
22 North Carolina; correct?

23 A She didn't tell me that because she can't tell me.

24 Q Did she tell you that she had gotten a lot of threats
25 during the first trial. Did she tell you that?

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1 A No, she did not.

2 Q Do you want to see your notes? Here Ill throw your
3 note -- Mr. Burt admits to all of this.

4 Government's 10094. Can we put this on the Elmo, I
5 appreciate it.

6 (The above-referred to exhibit was published in open
7 court.)

8 Q Do you see that, Dr. Woods?

9 A I do.

10 Q The second entry from the first conversation that you had
11 with Ms. Guerrero reads what?

12 A "I got a lot of threats during the first trial. I'm
13 sorry, I do not recall:

14 MR. McGOVERN: Did everyone get to see that?

15 Q So you agree that this Masters in Social Work,
16 Ms. Guerrero, that you relied on to reach your diagnosis here;
17 that one of the first things that she told you when you called
18 her to ask her about her relationship to the case was that the
19 last time the case was tried she was getting a lot of threats;
20 is that correct?

21 A That's correct. I'm sorry, I do not recall that.

22 Q You went right ahead with your interview; correct?

23 A Yes.

24 Q You never you take people at their word; correct?

25 A I'm not sure what you mean.

Woods - Cross/McGovern

1 Q Well, throughout your report, it doesn't appear that you
2 put, like, any real analysis into what it is that people are
3 telling you. For instance, you interviewed the family
4 members, and at no time do you address the issue of bias in
5 the stories that they're telling you; is that right, or am I
6 wrong?

7 A I don't specifically relate it to bias. I relate it to
8 looking through the entire record and seeing if what they tell
9 me is consistent with the record.

10 Q But you don't investigate to find out whether or not
11 they're biased or some of these family members may not
12 be -- may have a motivation to be not entirely truthful with
13 you; correct?

14 A Yes. Family members could do that.

15 Q Okay.

16 A And that's why I tried to interview them multiple times
17 and use other collateral sources to make sure that the stories
18 that I hear are consistent.

19 Q And you interviewed the defendant; correct?

20 A Yes.

21 Q And you told us that you used great caution when you
22 interview a defendant, or its not good medicine to take the
23 defendant's word for it because of the cloak of confidence;
24 right?

25 A Yes.

Woods - Cross/McGovern

1 Q All right.

2 A Confidence.

3 Q Confidence.

4 But you didnt do any investigation to check out what
5 it was that he was telling you, right?

6 A No, that's not true. Let me say this. If youre talking
7 specifically, I certainly did do investigation to check out
8 what he was saying.

9 Q Well, for instance, where he's telling you that, like, he
10 works in the kitchen over at the jail, you remember him
11 telling you that?

12 A Yes.

13 Q And he told you that he was having problems with other
14 inmates over there at the jail because they're not doing their
15 job and he has to cover for everybody else; right, something
16 like that?

17 A Yes.

18 Q And that would be something that would fit into the whole
19 idea of that the defendant is being victimized or exploited by
20 others because of his mild mental retardation; right?

21 A No, actually that's not correct.

22 Q That's not correct?

23 A Yes.

24 Q But regardless, you never went over and interviewed any
25 of the folks at the jail to find out if any of these things

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1 that he told you about, his current life at the jail, was
2 actually true or not true?

3 A I would not do so, sir, because, in a proper
4 investigation, you do not talk with or interview people that
5 are in a jail setting.

6 Q You can't even talk to other people who were in jail to
7 find out whether or not what the defendant is telling you is
8 true?

9 A The fact that someone is in jail with him, or the fact
10 that he's in a jail setting, is a structure in itself. The
11 structure of the jail and the social security regulations are
12 clear about this, the AAID is clear about this, there's a
13 structure that allows people to look better and to do better.

14 Consequently, they do not recommend that you
15 interview people in correctional settings in the same way that
16 they do not recommend that you take criminal behavior as an
17 aspect of adaptive fact.

18 Q Okay.

19 Doctor, I'm until asking you whether you went to the
20 jail to check out his adaptive functioning. I'm asking you
21 whether you went over to check out if anything he was telling
22 you was true or not?

23 A There would be no reason for me, sir, to go to the jail
24 and talk with correctional officers. It's not an appropriate
25 part of the investigation.

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1 Q Okay.

2 And that's these e-mails that you reviewed in this
3 case you said, with all fairness, you didnt review all of
4 them; right?

5 A No, I did not.

6 Q You looked through e-mails; right?

7 A Yes.

8 Q You made some point about what Mr. Burt said that the
9 defendant told you that he uses spell checker to get through
10 his e-mails; right?

11 A Yes.

12 Q Besides not being unusual, you would agree that after
13 reviewing his e-mails you noticed that most of them are in
14 like text speak; correct?

15 A I'm not sure what you mean may text.

16 Q Well, they're not really English, they're e-mails that --

17 A With "R" and.

18 Q Yes.

19 A Sure.

20 Q You could imagine that if that were a true statement that
21 he was using a spell checker, basically, his entire e-mail
22 would light up on the spell checker; right?

23 A As you know, on a spell checker, if it gives you
24 something, and you just go past it, it allows to you continue
25 to go.

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1 Q Okay.

2 But in whatever review you did of his e-mails, you
3 noticed that there wasnt correct spelling in those e-mails any
4 way even in the final product, correct?

5 A Correct.

6 Q All right.

7 Have you listened to the phone calls?

8 A Yes.

9 Q Okay.

10 And those phone calls, they didnt change your
11 opinion either; right?

12 A That's correct.

13 Q Okay.

14 When we spoke earlier, you testified that you've
15 done 40 Atkins evaluations in the last seven years, right?

16 A That's my numbers, yes.

17 Q And those were all for defense requests that you evaluate
18 somebody to see if they're intellectually disabled?

19 A Yes.

20 Q And you've testified on a number of issues other than
21 mental retardation over the years?

22 A Yes.

23 Q You've been an expert in mood disorders; right?

24 A Yes.

25 Q Intellectual disability?

Woods - Cross/McGovern

1 A Yes.

2 Q Bipolar disability?

3 A That is a mood disorder.

4 Q Okay.

5 You do competency cases; correct?

6 A Yes.

7 Q Post traumatic stress disorder?

8 A Yes.

9 Q Migraines?

10 A I have testified on migraines, yes.

11 Q Multiple personality disorders?

12 A I don't recall testifying on multiple personality
13 disorders.

14 Q And you've testified numerous times about application of
15 something called the MMPI?

16 A No, I have not. An application of the MMPI?

17 Q Well, you've testified in case where is people have
18 received the MMPI; correct?

19 A Oh, well, yes.

20 Q So you have a familiarity with it; correct?

21 A Up to the current one, the RF, yes.

22 Q And you've also testified in cases involving disexecutive
23 functioning; right?

24 A That is neurodevelopmental disorder.

25 Q Okay.

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1 A They're the same thing.

2 Q Yes.

3 So, Doctor, in this case, you've interviewed the
4 defendant how many times?

5 A Five times.

6 Q Have you interviewed him recently?

7 A Yes. November 20th, I believe.

8 Q Okay. So you want to change five to six times?

9 A Yes.

10 Q So you interviewed him on January 13th of 2012; correct?

11 A Yes.

12 Q March 30th of 2012; right?

13 A Correct.

14 Q April 16th of 2012; right? Its all on your report. Its
15 on the first page. Its on Page 3 of your report?

16 A Yes.

17 Q Okay. April 16th?

18 A Yes.

19 Q June 18th?

20 A Yes.

21 Q July 24th?

22 A Correct.

23 Q And then I guess on 11/20?

24 A Correct.

25 Q Your office is in California; correct?

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1 A Yes.

2 Q So you've flown back and forth to the East Coast on six
3 different occasions to interview the defendant; is that right?

4 A Yes.

5 Q Okay. And you then did several other interviews of
6 family members on multiple dates; correct?

7 A Correct.

8 Q And you did a whole bunch of other collateral interviews
9 of psychological professionals and people associated with the
10 school system; right?

11 A Yes.

12 Q I don't mean to embarrass you, but how much have you
13 actually billed on this case?

14 A So far I've billed \$59,000 and there's probably another
15 \$48,000.

16 Q So, at the end of this, youre going to be in the over a
17 hundred thousand dollar club?

18 A Yes.

19 Q And your testimony here is that all of that was
20 absolutely necessary to reach your diagnosis; right?

21 A And to support my diagnosis.

22 Q Of course. Right, you couldn't sit here and tell that
23 you just hit us for a hundred grand and youre not using it to
24 support?

25 THE COURT: Don't. That's enough.

Woods - Cross/McGovern

1 Q You worked with Dr. Olley in the past as well, have you
2 not?

3 A Yes.

4 Q Are you and Dr. Olley testified as experts together in
5 the Davis case; correct?

6 A Yes, that's correct.

7 Q You testified in the Bone case; is that right?

8 A The Bone?

9 Q Polk versus Bone.

10 A No.

11 Q You're not familiar with that case?

12 A No.

13 Q It's a -- I won't bother with it.

14 Doctor, there's been testimony in this case about
15 the coexistence of a learning disability and mental
16 retardation?

17 A Yes.

18 Q Do you agree that those two conditions do not typically
19 coexist?

20 A You can have a learning disability within a specific
21 learning disability within mental retardation. They are rare.

22 Q Rare, correct?

23 A Yes.

24 Q And the DSM, I believe, on Page 47, says that if you were
25 to have a learning disability and be mentally retarded at the

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1 same time that those two diagnoses would have to be sort of
2 out of whack with each other. You would have to have a severe
3 learning disability and really mild mental retardation?

4 A If I could see that.

5 Q Sure, Ill read it to you.

6 A I would like to see it if you don't mind.

7 Q You have the blue binder up there at Page 47.

8 THE COURT: What are you looking at now.

9 MR. McGOVERN: Page 47.

10 THE COURT: Of what.

11 MR. McGOVERN: Under "Differential Diagnosis."

12 Exhibit B, your Honor.

13 THE WITNESS: (Complying). That's actually not what
14 it says.

15 Q Let me read it out loud and then you can tell me if I'm
16 reading it correctly. It says, under the differential
17 diagnosis heading on Page 47, "A learning disorder or
18 communication disorder can be diagnosed in an individual with
19 mental retardation if this specific deficit is out of
20 proportion to the severity of the mental retardation."

21 A Yes.

22 Q Is that right?

23 A That's correct.

24 Q Okay.

25 You would agree that that's an extremely rare

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1 circumstance where you could have a learning disorder and
2 mental retardation at the same time, correct?

3 A Its not extremely rare but it is rare and it occurs.

4 Q Okay.

5 And in this case, pardon me for a moment, you didnt
6 find the existence of a learning disability; correct?

7 A That's correct.

8 Q So if there's been suggestion in this case that what's
9 really going on here is that the defendant suffers from a
10 learning disorder or learning disabilities and mental
11 retardation, that would be something that is inconsistent with
12 what your diagnosis is; correct?

13 A That's correct.

14 Q All right.

15 Would you also agree, Doctor, and I don't know what
16 your expertise in this is, that if a person, if there's
17 evidence that a person does better on exams in the academic
18 context, does better on exams where the exams are read to them
19 rather than where they have to read them themselves and fill
20 out the exam, that type of evidence would be indicative of the
21 presence of a learning disability; correct?

22 A No, that's not correct.

23 Q Okay.

24 And you would -- if there's that sort of evidence in
25 this record, or the records you reviewed, that would be

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1 consistent with your view that Mr. Wilson did not have a
2 learning disability; correct?

3 A If a person -- I'm sorry, let me answer the question.

4 THE COURT: Do you understand the question?

5 THE WITNESS: I don't quite understand the
6 question.

7 THE COURT: Okay.

8 MR. McGOVERN: Ill gladly rephrase.

9 THE COURT: Okay.

10 Q I just asked you a question whether if somebody performed
11 better on exams that were read to them rather than exams that
12 they took by themselves. I asked you if that would be
13 evidence of a learning disability and you said no; correct?

14 A Correct.

15 Q All right.

16 And so, I said if or I asked if there was evidence
17 of that type of evidence in this record that you reviewed that
18 would be consistent with your diagnosis that he doesn't have a
19 learning disability; right?

20 A Yes.

21 Q Okay.

22 You conducted interviews of some of the folks that
23 were associated with the schools that the defendant attended;
24 right?

25 A That's correct.

Woods - Cross/McGovern

1 Q And you reviewed what was going on at P9 at 209?

2 A That's correct.

3 Q In District 75?

4 A Yes.

5 Q And you realized that there were classes within the
6 school system at that time that would have addressed a child
7 that had symptoms of mild mental retardation, right?

8 A No, I'm not aware of that. I'm aware that there were
9 classes for moderate mental retardation, but I'm not aware of
10 classes for mild mental retardation.

11 Q Then there were cases that would have addressed some
12 suffering from some sort of mental retardation be to moderate
13 or otherwise?

14 A Well, there's a significant difference but, yes.

15 Q The significant difference is what, sir?

16 A That someone with moderate mental retardation is much more
17 impaired than someone with mild mental retardation. Someone
18 with mild mental retardation can often, by the time they're
19 older, function pretty effectively.

20 Q That's right.

21 So when Joyce Guerrero put a note in this
22 defendant's record that he was suffering from moderate mental
23 retardation that's totally incredible, isn't it?

24 A Totally incredible? No, it's not totally incredible, it's
25 wrong.

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1 Q Okay.

2 A May I finish? I'm sorry, may I finish?

3 Q Go ahead.

4 A Its wrong, but what it appears to reflect is

5 Ms. Guerrero's understanding that there were cognitive

6 problems with this young man and that they were severe. The

7 range of her diagnoses was inaccurate, but that's in my

8 opinion that's what it reflected rather than her just being

9 totally incorrect. She was wrong about the severity. In my

10 opinion, she was accurate about the diagnosis.

11 Q People with moderate mental retardation are often

12 institutionalized, aren't they?

13 A Yes.

14 Q So we can agree, and I think this would be good for us,

15 that we can agree that she was wrong in her diagnosis; right?

16 A In the severity of her diagnosis.

17 Q Exactly.

18 A But the not diagnosis itself.

19 Q Well, certainly, she had some view that he had some

20 cognitive problems; right?

21 A Yes.

22 Q Yes. But she's a social worker so she shouldn't be

23 diagnosing mental retardation anyway; right?

24 A It depends on what her background and history is.

25 Certainly, she should be able to pick up cognitive problems if

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1 she's had some training but not necessarily make the
2 diagnosis.

3 Q Okay.

4 And within your review of the school system and the
5 records you realize that Mr. Wilson was put in not classes for
6 the cognitively delayed, he was put in cases for the
7 emotionally disturbed.

8 Do you remember that?

9 A Yes. I don't recall classes for the cognitively delayed.
10 I may have missed that.

11 Q But the emotionally disturbed is something different than
12 the folks with cognitive delays; correct?

13 A Yes.

14 Q And by "emotionally disturbed," we're talking about
15 things like conduct disorder, correct?

16 A I'm sorry, that's a difficult question for me to answer
17 because conduct disorder is not a necessarily a psychiatric
18 diagnosis. It doesn't necessarily speak to the emotional
19 disturbance. In fact, people that have conduct disorder are
20 often just the opposite, they're not emotionally disturbed.
21 They do these behaviors because they choose to and because
22 they want to.

23 This was the difference that Mr. Kulis who was the
24 principal there made between the SIE-7 and SIE-8 programs. He
25 said the program that Mr. Wilson was in was those that really

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1 were not conduct disorder, but the other program with those
2 of which they were conduct disorder.

3 Q So -- and you've taken any issue with any diagnosis of
4 the defendant having conduct disorder anyway; right?

5 A No.

6 Q Well, on your direct, didnt you testify that the
7 professionals in the defendant's youth were misdiagnosing him
8 with conduct disorder when, in fact, he had symptoms that were
9 more akin to somebody with mental retardation?

10 A I think they had to take into consideration conduct
11 disorder and oppositional defiance disorder as one of the
12 possible diagnosis.

13 Q But you criticized Dr. Patterson for either putting in
14 his report that this defendant has a history of conduct
15 disorder and oppositional defiance disorder.

16 Do you remember that testimony?

17 A What I said was I didn't think it was the accurate
18 diagnosis. And I said that, as I just said, I think that the
19 diagnosis should have been broadened than just conduct
20 disorder or oppositional defiance because then you would have
21 looked at his brain and behaviors that may have come from his
22 cognitive functioning, that's what I said.

23 Q Okay.

24 So youre saying that these people, these
25 professionals, should have been looking at other things

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1 besides conduct disorder and oppositional defiance disorder,
2 or are you saying that they were just wrong about conduct
3 disorder and oppositional defiance disorder?

4 A I'm saying that, first of all, conduct disorder and
5 oppositional defiance disorder can coexist with mild mental
6 retardation.

7 So they could have made that diagnosis of conduct
8 disorder and/or oppositional defiance disorder. There is no
9 rule-out diagnosis for intellectual disability. So they could
10 have made that diagnosis. The point that I was trying to make
11 is they did not have the opportunity or what have you to look
12 for broader differential diagnoses that may have explained
13 this behavior.

14 They made these diagnosis solely on the basis of his
15 behavior and there were other factors going on medically that
16 could have explained this behavior as well. And we see that
17 the care that they gave him as, you know, as serious as they
18 were trying to help this young man often did not work.

19 Q Were they right or wrong in your view, your expert view,
20 were they right or wrong in diagnosing him with conduct
21 disorder, yes or no?

22 A No. In my opinion, they were not correct in diagnosing
23 him with conduct disorder. They were correct in keeping that
24 as a differential.

25 Q Okay.

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1 And were they right or wrong in diagnosing him with
2 oppositional defiance disorder?

3 A The same. They certainly should have looked -- that
4 should have been in their differential.

5 Q Okay.

6 And you don't include either of those in your
7 diagnosis here today, in your 2012 report; right?

8 A It would be childhood diagnoses. So there would be no
9 reason for me at this point to include those in my diagnostic
10 category.

11 Q Well, you don't diagnose them with antisocial personality
12 disorder; right?

13 A That's correct.

14 Q And you would agree that conduct disorder and
15 antisocial -- that conduct disorder is a precursor to
16 antisocial personality disorder?

17 A It can be, that's correct.

18 Q Is your view at this point that the defendant doesn't
19 suffer from antisocial personality disorder?

20 A There's a difference between antisocial behaviors and a
21 mental disorder, personality disorder, called "antisocial
22 personality disorder." I'm very clear that he suffered and
23 did antisocial behaviors. I'm less clear that he carries a
24 personality diagnosis of antisocial personality disorder.

25 Q Why didnt you just do the MMPI exam, the Minnesota

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1 Multiphasic Personality Inventory. Why didnt you just do that
2 and put an answer to that question?

3 A Well, because the MMPI does not answer that question for
4 a couple of reasons.

5 The MMPI is what they call a trait test as you
6 probably know rather than a state test, so it really looks at
7 the person at the time that they're taking the test.

8 Number two, there's no automatic diagnosis of
9 antisocial personality on the MMPI. There's no category or
10 profile. There are profiles, but there's no category that
11 says someone is antisocial.

12 Q Okay. So, Doctor, moving along.

13 During your direct examination, you were asked some
14 questions about the various prongs that have to be satisfied
15 for someone to be diagnosed accurately as having mental
16 retardation. Do you remember that testimony?

17 A Yes.

18 Q And you said that there was prong one which was the I.Q.
19 criteria?

20 A Correct.

21 Q And then two is adaptive behavior; right?

22 A Correct.

23 Q And three is the onset before the age 18?

24 A Correct.

25 Q And you testified on direct examination that your opinion

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1 is based on a full review of all those issues, correct?

2 A Yes.

3 Q All right. And you testified --

4 MR. McGOVERN: Well, Ill withdraw that.

5 Q Do you agree that if your I.Q. is not less than 75 or 75
6 or less, you're not mentally retarded?

7 A Would I agree that if the one's I.Q. is not 75 or less
8 that youre not mentally retarded?

9 Q Yes.

10 A No, I would not agree with that.

11 Q You would not agree with that?

12 A Yes.

13 Q Didnt you just write an article in 2012 that talked about
14 I.Q. analysis in the Atkins context?

15 A I.Q. analysis?

16 Q Yes.

17 A No.

18 Q I.Q. analysis?

19 A No.

20 Q Didnt you this article that was handed to me this
21 morning, a 2012 article, that's, I guess, in Defense R or
22 actually its Defense S its in the Neurobehavioral Assessment
23 and Forensic Practice?

24 A Oh, yes, that wasnt just about I.Q. analysis.

25 Q Certainly not, that would have taken up too much of the

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1 article; correct?

2 A I don't understand your question.

3 Q Okay. Well, in that article at Page 435, you say "I.Q.
4 scores are mainly useable in diagnosing mental retardation now
5 termed intellectual disability. As a score below 70 to 75 is
6 typically used to make that diagnosis in Atkins v. Virginia
7 death penalty exemption or criminal proceedings where a
8 diagnosis of mental retardation may be relevant."

9 Did you remember writing that a couple months ago?

10 A Yes.

11 Q And so what that statement is that your view or what
12 you're promulgating or publishing for your colleagues in the
13 International Journal of Law and Psychiatry is that in Atkins
14 cases your view is that the cut off should be an I.Q. of less
15 than 75; right?

16 A No, that's not correct. If I could read the rest of
17 the -- may I? May I?

18 Q No, I'll ask you some more questions about that.

19 Is this more of an observation on your point than
20 typically in Atkins cases that the I.Q. cut-off is 75? Is
21 that what this is?

22 A I think I go on to note that that test of intellectual
23 abilities are designed to tap the variety of intellectual
24 functioning. They consist of subtests, assessment of an
25 individual's current level of cognitive functioning. Is one

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1 of the primary psychodiagnostic functions of intellectual
2 patterns of scores and performance of subtests may be of
3 interpretive significance as well. I talk about the types of
4 cases.

5 And so, what I actually say here, and I go on to
6 say, in such in interpreting I.Q. scores there are times when
7 the results should be discounted or adjusted to correct for
8 possible confound or sources of error among which are the
9 anyone practice effect et cetera et cetera. So, really, its
10 consistent with what the AAIDD says. Its an approximate of 75
11 but not a hard-and-fast of 75.

12 Q Okay. Well, the sentence that I read that said in Atkins
13 cases that the I.Q. is supposed to be less than 75, was that
14 an inaccurate way that I read your sentence?

15 A I'm sorry, would you please read it for me again. As I
16 read the sentence, a score who 70 to 75 is typically used to
17 make that diagnosis in Atkins v. Virginia and other criminal
18 other proceedings where a diagnosis of mental retardation may
19 be relevant. That's accurate.

20 Q All right.

21 You would agree that that sounds a lot like somebody
22 named George Woods writing an article that says in Atkins
23 cases the I.Q. cut-off is 75; correct?

24 A I would disagree, sir. I would disagree.

25 Q Okay, that's fine.

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1 I want to read to you the sum total of your entire
2 review of the I.Q. prong materials in this case as reflected
3 in your report.

4 At Page 21 of your report, Government's 11,050.

5 "Atkins I.Q. prong criteria. For the reasons stated
6 in the report of Dr. James, Dr. Shapiro, and Dr. Olley which I
7 have reviewed and relied upon, Mr. Wilson meets the I.Q. prong
8 of the Atkins case."

9 Did I read that correctly?

10 A That's correct.

11 Q And you would agree in this 30-page, single spaced,
12 probably number eight font report, that you put together that
13 is the total of your review of the I.Q. prong of the mental
14 retardation evaluation; correct?

15 A That's correct.

16 Q And you would agree looking at this, and this is in
17 evidence already and I believe you attached to -- its attached
18 to your papers as well. This is the Dr. James chart of all
19 the I.Q.s in this case.

20 Do you see that?

21 A Yes.

22 Q And you've seen that before; right?

23 A I've seen the scores, yes.

24 Q Okay. And we've highlighted here the scores that the
25 defendant obtained in the various nine I.Q. tests that he's

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1 had; right?

2 A Yes.

3 Q And you would agree that other than this December 5,
4 1994, I.Q. test, Mr. Wilson appears to be pretty much out of
5 the woods on the mental retardation prong one; correct?

6 A No, sir, I would not agree.

7 Q Okay. But you would agree that that's a 71; right?

8 A Yes.

9 Q And that at least, according to your article, would put
10 you in the heartland of at least being able to have an
11 Atkins-type mental retardation evaluation; correct?

12 A Yes.

13 Q Okay. And the 84 is probably not going to do it; right,
14 from January of 1989?

15 A Well, I would disagree, sir. I think that the article
16 describes what occurs in Atkins hearings but the AAIDD is very
17 clear that its an approximation.

18 Q Okay.

19 So any one of these numbers, in your estimation,
20 could be good enough for it meet the criteria for prong one;
21 correct?

22 A First of all, each of these needs to be statistically
23 adjusted for it to be appropriate.

24 Q Of course?

25 A So that would include the Flynn effect.

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1 Q You Flynned them; right?

2 A Right. In each, certainly, no, these have not been
3 Flynned. The Abramson set at 84 has not been Flynned. The
4 Drezner has been Flynned. The Aranov has eventually been
5 Flynned. The Popp has not been Flynned. The Drobb, yes. I'm
6 sorry I apologize.

7 Q That's okay. You would agree, I guess looking at these
8 numbers, that I.Q. would be a very, very important issue in
9 this case?

10 A Yes.

11 Q Its a big determination that the Court has to make to
12 decide whether or not this young man is mentally retarded.
13 That's an important matter; right?

14 A Its one, yes.

15 Q Well, no, the whole issue of whether or not he's mentally
16 retarded is an important matter. You would agree with that;
17 right?

18 A I'm just hesitant to -- I do think that I.Q. is an
19 important factor for the Court to take into consideration, but
20 it also includes adaptive functioning as well.

21 Q Absolutely.

22 A Yes.

23 Q Lets say the onset before 18 isnt really a prong at all,
24 isnt it? Everybody can make that argument that they have an
25 onset before 18; right?

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1 A No. Well, in this particular case, is not an issue but
2 it can be.

3 Q So we really have two issues here if I'm understanding
4 you. Its the I.Q. prong and there's then adaptive functioning
5 prong?

6 A Your.

7 Q But you agree looking at these numbers that when you're
8 posting 84s and 78s and 80s and 84s and 76 and 80, I.Q. is
9 going to be very important. Whether or not you agree with it
10 or not its going to be an important matter to be discussed in
11 this courtroom; correct?

12 A Yes.

13 Q But in your report you dedicate a sentence to it, right?

14 A Yes.

15 Q Okay.

16 And you've conducted interviews beyond just the
17 family members of the defendant, right?

18 A Correct.

19 Q You went out and you interviewed Arthur Popp; right?

20 A Yes.

21 Q And Arthur Popp is the person who did the I.Q. in 2000?

22 A Correct.

23 Q And you spent a lot time with him out at his school in
24 Far Rockaway?

25 A I spent about an hour with him, yes.

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1 Q And then you also went out and you interviewed Carla
2 Drezner in her living room out in wherever she is in
3 Long Island?

4 A Yes.

5 Q You sat with her for an hour, hour and a half?

6 A Yes.

7 Q And then you also interviewed Mr. Giglio?

8 A Yes.

9 Q Did you do that on the phone, or did you do that in
10 important?

11 A I did that on the phone.

12 Q And you interviewed Dr. Drobb; right?

13 A Yes.

14 Q And you spent some time over in his office; correct?

15 A Yes.

16 Q And then, Mitchell Frank, you viewed him as well?

17 A Yes.

18 Q And you did that where?

19 A Over the telephone.

20 Q So these times that you were out here on the East Coast
21 interviewing these professionals you were getting information
22 that you believe would be valuable to the question of what the
23 valid I.Q. is; right?

24 A That and his developmental history.

25 Q Come on, Dr. Popp doesn't know anything about his

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1 developmental history. He took a I.Q. from him on one day in
2 January of 2000?

3 A That's not correct, sir. He had just come to the school.
4 When you look at Dr. Popp's -- when you look at Dr. Popp's
5 information, he described how he looked that day, described
6 things that were inconsistent like he loved reading and
7 science. So all of that is developmental history.

8 I mean, just because someone is taking a test
9 doesn't mean that they don't have something to provide to you.
10 So it wasn't just a function of did you give him an I.Q. test
11 and what did it mean? Each person that I talked to I tried to
12 ask them about their report and their background as well. So
13 in that sense, it wasn't just about I.Q.

14 Q Okay. You've read the transcripts of this hearing;
15 correct?

16 A Yes.

17 Q And you realize that Dr. Shapiro didn't really speak to
18 I.Q., correct, he was speaking more about adaptive
19 functioning?

20 A No that's not correct.

21 Q As he wasn't cross-examined about I.Q., I'm sorry. Do
22 you remember that?

23 A Yes.

24 Q And, Dr. Olley, he testified about adaptive functioning;
25 correct?

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1 A Yes.

2 Q And Dr. James discussed the I.Q.s in this case; correct?

3 A Yes.

4 Q And so, Dr. James, she came with you when you went to
5 meet with Dr. Popp?

6 A No.

7 Q She came with you when you went to meet Ms. Drezner?

8 A No.

9 Q Did she help out with the Giglio interview at least?

10 A No.

11 Q How about the interview of Dr. Drobb? Was she there for
12 that?

13 A No.

14 Q And, Mitchell Frank, was she part of that interview?

15 A No.

16 Q Doctor, from your review of the transcripts, it appears
17 that she's the person whose testifying about the validity of
18 these I.Q.s on a very, very granular level; right?

19 A And Dr. Shapiro.

20 Q Okay.

21 But, Dr. James, who just testified in this courtroom
22 this morning, and over the weekend, she was not with you when
23 you were out interviewing these folks who gave who actually
24 gave the I.Q. test?

25 A No.

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1 Q Is there any truth to the statement that those
2 professionals were not made available to Dr. James?

3 A I don't know that.

4 Q When you wanted to go meet with them, did anybody at the
5 defense team say no, no, no, we don't want you to meet with
6 them?

7 A No.

8 Q You had access to whoever you liked; right?

9 A Except for Ms. Guerrero, yes.

10 Q Okay, except for Ms. Guerrero because she wouldnt come to
11 New York?

12 A Because she wouldnt answer my telephone call.

13 Q It was very difficult to get her on the telephone, wasnt
14 it?

15 A I wasnt able to for a long time.

16 Q And she would never call you back; right?

17 A That's correct.

18 Q You would leave messages for her?

19 A I did.

20 Q And then you do get to talk to her and she tells you that
21 she's been threatened in this case; right?

22 A That was the first one that first interview.

23 Q Did she tell you that she lied on her job application to
24 get the job that she has now in North Carolina?

25 A No.

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1 Q Did she tell you that she's actually met with
2 Judge Garaufis before?

3 A No.

4 Q Did she tell you that she attended the sentencing in
5 2006?

6 A No.

7 Q Did you ask her about these things, about whether anyone
8 else had contacted her?

9 A Well, I knew that the Government had contacted her.
10 Obviously, from my first interview, which I did not recall,
11 but I didn't know if anyone else had contacted.

12 Q Okay. So, Doctor, beyond the P9 review you spoke to
13 Dr. Kulis; correct?

14 A Correct.

15 Q And Mr. Kulis told you that he believed that he had, I
16 think as you put it in your report, that he had a solid
17 program; right?

18 A Yes.

19 Q If he had any complaints about the way things were going
20 on over at that school during that period of time is because
21 of a lack of resources; right?

22 A No, I would not say that it was a lack of resources. I
23 think that was one of the issues. I think Mr. Kulis
24 recognized later that, well, I should say that economic
25 resources but primarily other types of resources. He didnt

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1 realize what a broad array of resources. He certainly had
2 pure professionals and that type of training. I mean, that
3 type he didnt have a broader base of resources so in that
4 youre right.

5 Q He didnt complain about the psychologists who were
6 working with him at that school putting untruths in their
7 psychological exams; right?

8 A Specifically untruths, no.

9 Q Yes. I mean, he had relatively nice things to say about
10 the psychologists who were working with him?

11 A He said they were hard working and overworked.

12 Q Okay. But doing the right thing under the circumstances;
13 right?

14 A I think that's accurate.

15 Q Doctor, in your report, you review all of the notes and
16 the records that you saw and you end with the defendant's
17 release from Brookwood back in, I guess, November of 1999.
18 And that would be at Page 15 of your report.

19 And you said in your last paragraph on this matter
20 at Government's 11 044. "After his discharge from Brookwood,
21 it is important to note that there were no follow-up plans
22 made for Ronell. No support system to counter his cognitive
23 delays and adaptive functioning deficits.

24 As one always sees when the mildly mentally
25 retardation have no supports systems they cannot function

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1 independently. A disaster waiting to happen. This was no
2 less true for Ronell Earl Wilson."

3 Do you remember writing that?

4 A Yes.

5 Q Fairly dramatic, is it not?

6 A I don't think so. I think it was pretty accurate given
7 the circumstances that we're currently in.

8 Q Well, yeah, the circumstances we're currently in its
9 pretty obvious that the disaster happened?

10 A Yes.

11 Q And two people lost their lives in the middle of the
12 disaster; right?

13 A That's correct.

14 Q The question was really, as far as youre concerned as an
15 expert, is whether what that statement that you included in
16 your report whether or not its entirely accurate, so let me
17 see if I can unpack it a little bit.

18 A Sure.

19 Q You would agree that the literature and the testimony in
20 this case has been people with mild mental retardation are no
21 more likely to commit violent crimes than any other group of
22 people, right?

23 A That's not my understanding of the literature, although
24 it is true that its a, again, a rare occurrence.

25 Q Okay.

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1 So it's not your understanding of the literature but
2 you would agree that people who have mild mental retardation
3 committing acts of violence is a rare occurrence; right?

4 A I would have to disagree, Mr. McGovern. People that have
5 mild mental retardation often are disruptive, are agitated.
6 Do they, in fact, commit homicides, that's rare. But do they,
7 in fact, have violent acts, that is not rare.

8 Q All right. So maybe I misheard your last answer.

9 Your view is that people who have mild mental
10 retardation are probably more likely to commit acts of
11 violence than people who don't, right?

12 A There's a higher incidence of that kind of disruptive
13 behavior with people that even have mild mental retardation.
14 Its more common in moderate mental retardation, but even in
15 mild mental retardation you do see more disruptive behavior.

16 Q You see more disruptive behavior?

17 A Yes.

18 Q A large percentile of more disruptive behavior?

19 A Its really difficult to really identify in terms of mild
20 mental retardation because people who have mild mental
21 retardation don't come to the -- don't come to the resources,
22 different organizations, regional centers, et cetera as often
23 as people who have more severe mental retardation.

24 Q Would you agree that a person who has a history of
25 conduct disorder and a history of oppositional defiance

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1 disorder and other learning problems, when they get released
2 from a secure facility that that person poses a higher risk of
3 disaster than a person with mild mental retardation just being
4 released into the community?

5 A I can't really answer that question.

6 Q Okay. But your statement here about this being a
7 disaster waiting to happen, "and this was no less true for
8 Ronell Earl Wilson," you would agree that's a little bit of a
9 flowery overstatement of what we're talking about her?

10 A I don't think so, sir.

11 Q Doctor, I would like to talk to you about your meetings
12 with the defendant. You said that you did a full
13 neuropsychiatric mental status examination?

14 A Yes.

15 Q And in your report you note that essentially the
16 defendant looked okay when you met with him?

17 A In terms of his external appearance.

18 Q Mm-hmm?

19 A Yes.

20 Q Okay. And that he sounded okay to you, like, when he
21 spoke to you?

22 A He was a bit slowed.

23 Q On Page 17, just talking about these communication issues
24 that you identified. On Page 17, the top paragraph, you said
25 that the defendant had multiple paraphrasic errors?

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1 A Correct.

2 Q On the Montreal Cognitive Assessment, he said, "I know
3 John was always one to help today" instead of "I know that
4 John is the one to help today."

5 A Yes.

6 Q That's not a paraphrasic error, is it?

7 A Yes.

8 Q Isnt a paraphrasic error where you used two different
9 words that sound the same and use them out of context?

10 A That can be a paraphrasic error. A paraphrasic error is
11 also inserting or deleting words in a sentence.

12 Q Okay. Mr. Wilson, in that interview, described himself
13 as being a germophobe?

14 A Correct.

15 Q You would agree that's unusual for someone who's in
16 prison; right?

17 A No.

18 Q Its your experience, other than Atkins cases, dealing
19 with folks who are incarcerated?

20 A Yes.

21 Q So you've done a lot of interviews of people who are in
22 jail?

23 A Yes.

24 Q And you've come across a lot of germophobes during your
25 time interviewing people in jail?

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1 A People that are excessively clean, yes, not necessarily
2 to use that term.

3 Q This is a gentleman, the defendant, who you describe as
4 being having the vocabulary of a fifth grader; right?

5 A Yes.

6 Q And he's using words like germophobe on you; right?

7 A Germophobe is not a word. But it is -- it does
8 accurately describe what he is talking about, being afraid of
9 germs.

10 Q So he has no problems expressing himself correctly?

11 A In that one word, yes.

12 Q And you'd agree that's a polysyllabic word?

13 A Correct.

14 Q And that's indicative of his ability to at least use
15 terms that are sort of inconsistent with someone who would
16 only be at the level after fifth grader; right?

17 A Absolutely not, that is the level of a fifth grader.

18 Q Okay.

19 You know that Dr. Shapiro and Dr. Olley have
20 testified about the defendant having a history of hygiene
21 problems; correct?

22 A Yes.

23 Q And you would agree that someone who is a self-professed
24 germophobe is probably not the type of person who is having
25 hygiene problems; correct?

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1 A That's correct. I think that if you look at it from a
2 temporal point of view. As I say in my report, there are
3 other times that he was described as having problems with his
4 hygiene. But I also noted that there were times when he was
5 doing very well and was seeing him in prison doing very well
6 having everything given to him.

7 Q Well, what you see in prison is a person who looks pretty
8 well looked after; right?

9 A That's exactly it, he looks well looked after.

10 Q He has -- his shoes are always immaculate; right?

11 A Yes.

12 Q His prison outfit is always ironed?

13 A I can't really say. When I've seen him, he certainly has
14 had everything physically together.

15 Q All right. And I know that youre saying that you've
16 heard from some other folks like Monica Cook or some other
17 family members that he had a problem, you know, changing his
18 clothes back in, you know, several years ago; right? Is that
19 what youre referring to?

20 A I'm referring to the Brookwood records where Mike Hall
21 describes him having problems with his hair. Naida Washington
22 and Viera describe him as having difficulty with his hygiene
23 over time.

24 So it wasnt really Monica Cook it was people
25 although she did say it as well. It was really people within

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1 the Brookwoods records that described him having that problem.

2 Also, early on in 1994, when he was young, they
3 described him in the hospital. They describe him as having
4 difficulty maintaining his hygiene. So it really wasnt just
5 Monica Cook. Although, within the prison setting, he has
6 obviously done very well?

7 Q So whatever problem he may have had with hygiene in the
8 past that perhaps Dr. Olley and Dr. Shapiro have talked about
9 and now you've talked quite a bit about he appears to have
10 grown out of that; right?

11 A Grown out of it is not what I would say, sir. What we
12 really say is he is in a structured environment where he
13 doesn't have to think about those things.

14 Mr. Wilson's tendency is to respond to structure and
15 that certainly has been what's true in prison. And so, he
16 doesn't have to look for these things. Its the kind of
17 supports that you see that make mildly mentally retarded
18 people look very well and do well.

19 Q So he hasn't grown out of it. He's certainly changed
20 from the way that he used to be, yes or no?

21 A I'm sorry, its not a yes-or-no question.

22 Q Okay. Then Ill withdraw it.

23 So, anyway, you also talked about him suffering from
24 something called grandiosity, correct?

25 A Yes.

Woods - Cross/McGovern

1 Q And by grandiosity you mean what?

2 A The cloak of competence. By grandiosity, I mean him
3 telling Dr. Popp his favorite things to do are reading and
4 science; or, by grandiosity, a cloak of competence. I think
5 some of the ideas of writing a book or writing a screenplay.

6 Q Yes. Grandiosity; right?

7 A Cloak of competence, grandiosity.

8 Q Grandiosity means its an internal feeling that or, excuse
9 me, an external sort of sense that youre doing bigger things
10 than you are. Projecting that youre doing bigger things than
11 youre are; right?

12 A That's not it at all.

13 Q Let me see if I can ask another question.

14 You say that one of the elements that leads you to
15 believe that he's got a cloak of competence --

16 A Yes.

17 Q -- is that he's claims he's writing a book; right?

18 A Not that he claims that he's writing a book because he
19 does say that he's writing a book. But the quality with which
20 he describes writing a book.

21 Q Well, if he's writing a book and he tells you that he's
22 writing a book, that's not grandiosity, is it?

23 A Well, given someone that has such difficulty writing
24 consistently I would find it unusual and perhaps a little bit
25 excessive to think of him writing a book.

Woods - Cross/McGovern

1 Q So you dug in, right, and you looked to find out if he
2 was actually writing a book?

3 A I talked to him about what the book was about.

4 Q Did he give you a copy of the manuscript?

5 A He did not give me a copy of the manuscript.

6 Q You know he has a copy of the manuscript; right?

7 A Yes.

8 Q Okay.

9 But this is what I was talking to you about before,
10 Doctor. When youre interviewing the defendant, youre taking
11 him at his word; right? So when he tells you that he's
12 writing a book, you interpret that as grandiosity; right?

13 A No, sir. When he told me about the manuscript and about
14 the book, again, we are looking at someone that has supports
15 to do these things. He has -- its the same thing with his
16 Facebook page or his e-mails.

17 His Facebook page, for example, he has someone I
18 believe in Turkey that is actually helping him put this
19 together. That is helping him in, certainly, when someone
20 writes a book they are helping putting this together. But
21 this is the kind of thing that someone with mild mental
22 retardation can only do with significant supports.

23 Q Okay. Did you call Turkey to find out about this, about
24 the Facebook page?

25 A No.

Woods - Cross/McGovern

1 Q Would you be surprised that Houston is not in Turkey, its
2 in Texas?

3 A Okay. Then I apologize.

4 Q Okay. So you would agree that based on your
5 investigation you don't know how he's running this Facebook
6 page; correct?

7 A No, no, no. The fact that I got the geography wrong
8 doesn't mean I got the supports wrong.

9 Q Lets talk about the supports.

10 Don't you believe, or would you agree, that it takes
11 a certain level of abstract thinking to be able to run a
12 Facebook page from prison?

13 A Absolutely not.

14 Q Okay.

15 Well, you would agree that he doesn't have access to
16 the Internet while he's in jail; right?

17 A That's correct.

18 Q Okay.

19 And he's been in jail since March of 2003; right?

20 A That's correct.

21 Q So the only way that he knows anything about Facebook is
22 either people have told him about Facebook; right?

23 A Perhaps.

24 Q Or people have or he's seen something about Facebook on
25 television while he's staying in jail watching television;

Woods - Cross/McGovern

1 right.

2 A There are multiple ways that he could have found out
3 about Facebook.

4 Q One of the ways that he wouldnt have found out about it
5 is by actually logging on to a computer and going to a
6 Facebook page; correct?

7 A That's probably correct.

8 Q So you don't agree that it takes a fair amount of high
9 thinking to be able to conceptualize the idea of Facebook and
10 then orchestrate it from a position where you have absolutely
11 no access to the page?

12 A Its actually just the opposite, sir. A person, you see,
13 Facebook and other types of social media that are consistently
14 used by people that don't have access. They may not be in
15 prison but they maybe cognitively impaired. There are
16 multiple ways in which people that don't have that kind of
17 access can work on, find Facebook, can work on Facebook, can
18 maintain a Facebook page.

19 It takes absolutely none of this higher thinking as
20 you describe it to be able to maintain a Facebook page once
21 you have supports and that's what he has. He has supports.

22 Q Given all that, you agree that a person with mental
23 retardation just like an average fine, thinking person could
24 run a Facebook page from jail?

25 A He's not running the Facebook page. He is, and I

Woods - Cross/McGovern

1 apologize about the geographical mistake. He has a
2 intermediary that is helping him with a Facebook page. So, in
3 that sense, its no different than any type of mildly mentally
4 retarded person that is able to develop supports to help him
5 do these types of things.

6 Q And you've reviewed the Facebook page; right?

7 A I think I looked at it perhaps when I first interviewed
8 him but I have not looked at it lately. I don't recall --
9 actually, I don't recall looking at it.

10 Q You realize that he's the one who makes the decision of
11 who is allowed to come on to his Facebook page and who is not
12 allowed to come on to his Facebook page?

13 A Sure.

14 Q You would agree that the people who contact him on
15 Facebook, many of them haven't had contact with him in over
16 ten years; right?

17 A Sure.

18 Q And you would also agree that based on your review of the
19 e-mails, of course, that you've seen evidence that he's able
20 to actually remember people from ten years ago and decide
21 whether or not they should be his friend on Facebook or not be
22 his friend on Facebook?

23 A There's no reason why a person with mental retardation
24 would not be lab.

25 Q Well, don't people with mental retardation suffer from

Woods - Cross/McGovern

1 memory problems?

2 A I'm sorry, these are the types of broad generalizations
3 that really are inaccurate when youre trying to determine
4 whether someone has mild mental retardation.

5 A person that has mild mental retardation may or may
6 not have memory problems. The types of memory youre talking
7 about in terms of long-term memory is the most solid type of
8 memory. So they may be remembering someone from a long time
9 ago rather than someone more recently so that's not accurate.

10 Q Okay.

11 And so, when I ask you a question about whether
12 people with mental retardation suffer from memory deficits.
13 Typically, your answer is that they don't?

14 A No, my answer is it depends upon the person.

15 Q Okay.

16 A It depends upon the type of memory deficits there are
17 multiple types of memory deficits.

18 Q In your report, you say that the defendant doesn't have a
19 sense of humor.

20 A I wasnt able to elicit a great sense of humor.

21 Q Were you telling him jokes and he wasnt getting them?

22 A I was actually reading things to him to see.

23 Q Okay.

24 And when you read him funny things he didnt seem to
25 understand them.

Woods - Cross/McGovern

1 Is that what your testimony is?

2 A There were some that he seemed to understand, those that
3 were pretty straightforward. Others that were more abstract
4 he had difficult with.

5 Q And he would often miss of point of jokes according to
6 you?

7 A At times.

8 Q And so you've listened to the phone calls in this case;
9 right?

10 A Yes.

11 Q You would agree that in listening to the phone calls,
12 apparently, he has no laughing about what people are saying on
13 the telephone; right?

14 A Yes.

15 Q Maybe he's not getting the jokes that youre telling him,
16 but you would agree that on that's telephones calls he seem to
17 be getting a lot of jokes; correct?

18 A No.

19 Q Your review is different than that?

20 A What?

21 Q Your review was different than that? You find it
22 different?

23 A Telling a joke is a different skill than having a
24 conversation and laughing at the context of the conversation
25 of what's going on. Telling jokes are noncontextual. Having

Woods - Cross/McGovern

1 a conversation and talking with someone, and you know what's
2 going on, and that's a much different linguistic phenomenon
3 than telling thor a joke.

4 Telling a joke, you got to hold the joke in your
5 mind. You've got to understand the context of the joke, and
6 you got to get the punch line. When youre talking with
7 someone, there's a context that is ongoing that may allow you
8 to understand what's going on or not. They're very different
9 situations. They're very different situations.

10 Q Okay.

11 So he's not able to engage in something we refer to
12 as like repartee, right?

13 A I've seen where he has engaged in repartee.

14 Q Just so we can put this one in the rearview mirror. Your
15 sworn testimony is, based on what you saw, his sense of humor
16 is a little off; right?

17 A I see where he's engaged in repartee. I do believe that
18 his sense of humor in terms of telling jokes is not good.

19 Q Did you put in your report that the defendant had a
20 difficult time with providing a full medical history of his
21 times in the hospital and other exams and times in school?

22 A I don't recall. I do recall, on Page 18, Mr. Wilson can
23 describe his physical status in terms of his current health
24 status. He is not able to provide any information about his
25 past medical history. He can could not provide names of

Woods - Cross/McGovern

1 previous medications or illnesses such as the meningitis. He
2 cannot provide periods of hospitalization, particularly,
3 psychiatric hospitalization. He was unable to provide
4 previous diagnoses both physical and psychiatric.

5 Q Okay. And so, you took him at his word when he said, I
6 can't remember any of this. You thought that that was an
7 accurate statement; correct?

8 A Except for his hiatal hernia. I thought it was pretty
9 accurate and I did not put that in my report.

10 Q That he was pretty accurate about his history or not?

11 A About his history.

12 Q He was accurate about his history?

13 A In terms of his hiatal hernia, yes.

14 Q But otherwise, he couldn't tell you anything about what
15 his prior history of psychiatric or psychological history was,
16 right?

17 A He knew that he had been psychiatrically hospitalized but
18 he could not provide the names of medications. He could not
19 provide the periods of hospitalization. He knew that he had
20 been psychiatrically hospitalized, but the particulars were
21 what he was not able to provide.

22 Q And that was unusual; correct?

23 A Correct.

24 Q You would expect a person, an average person, to be able
25 to sit down with you in a visiting room in a jail and tell you

Woods - Cross/McGovern

1 every hospitalization that they've had or what medications
2 they took; right?

3 A No, not every.

4 Q But a lot of them; right?

5 A They would be able to give me a much more thorough
6 history than the history that he was able to give me.

7 Q Did you review Dr. Patterson's report?

8 A Yes.

9 Q Did you see in Dr. Patterson's report during the same
10 type of examination that you were doing here only on one
11 occasion rather than six that Dr. Patterson asked the
12 defendant for a history and he recounted essentially his
13 entire medical history and academic history?

14 A Actually, that's not accurate. For example, with
15 Dr. Patterson, he recounted only one of his medications maybe
16 two. He recounted some Prozac but he was on a number of other
17 medications. I don't recall him recounting the specific
18 periods of his hospitalizations. So I'd like you to show that
19 no me if you could in terms of his complete history. I don't
20 recall that in Dr. Patterson's report.

21 Q If you don't recall it that's fine. These -- this
22 history of medications that he was taking?

23 A Yes.

24 Q These are medications where he's taking between the ages
25 of, like, 6 and 12, am I right?

Woods - Cross/McGovern

1 A I believe up to about 13, that's correct.

2 Q And so his inability to recall what he was taking Ritalin
3 and imipramine or whatever that is. When he was six years
4 old, seven years old, eight years old, nine years old, ten
5 years old, 11 years old, 12 years that's significant to you;
6 right?

7 A Six years old, no. Seven years old, no. Eight years
8 old, no. 9, 10, 11, 12 years old, yes, particularly since he
9 took these medications, particularly he took the Ritalin and
10 the imipramine for a significant period of time.

11 Q Wasnt the problem is that you saw in his records that
12 people in his family were discouraging him from taking the
13 medications?

14 A There were times when they were discouraging him. There
15 were other times when they were encouraging him to get his
16 medications. So it was really both cases.

17 Q So at least there's some evidence that if he was
18 prescribed these medications there was some people in his
19 immediate family telling him not to take them; right?

20 A And also to take them.

21 Q Okay.

22 And so that would be something that you might want
23 to consider when youre considering the significance of his
24 knowledge of what medications he's been prescribed as a little
25 boy; right?

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1 A I'm sorry, I don't see how them telling him not to take
2 them would keep him particularly as a latency age person from
3 knowing what he was to take. I particularly like the Ritalin
4 which he was taking for a long time. He was taking it in
5 school as well.

6 Q You would imagine as six and seven-year-old he's not
7 going to CVS and picking up his prescription?

8 A As I six or seven seven-year-old.

9 Q Eight or nine or ten-year-old. He's not going to a
10 pharmacy and picking up his own medications; right?

11 A That's correct.

12 Q So there's some adult involved in this equation; correct,
13 about in whether he get medication?

14 A That's correct.

15 Q So if there's evidence in this record that the folks who
16 were supposedly giving him his medication weren't giving it to
17 him at all that's significant about whether or not he has a
18 full inventory or a knowledge of a full inventory of his
19 medications; right?

20 A But its also not accurate that they were not giving it to
21 him at all. He was getting his medications from the school.
22 There were nurses there that were to give him his medications.
23 He was also given his medication as all because there were
24 side effects that the family was complaining about. So the
25 idea that he was not getting them at all was not accurate.

Woods - Cross/McGovern

1 Q Okay. In the judgment section of your report you said
2 that Mr. Wilson was extremely gullable. Multiple persons and
3 documents attest to his vulnerability. Mr. Giglio and
4 Mr. Hall discussed Mr. Wilson claiming Bloods membership when
5 he was, in fact, not a Blood, nor will the Bloods acknowledge
6 him that he was part of the gang; right?

7 A That's correct.

8 Q And so you know that he is a member of the Bloods; right?

9 A He was a member of the Staten Island group, not of the
10 Brookwood group. They're different groups.

11 Q So it was -- so maybe I misunderstood this. He was
12 claiming Blood membership when he wasn't a Blood; right?

13 A In the Brookwood group. He was as a like flagging or
14 whatever they call him in the Brookwood group. And Mr. Hall
15 specifically talked about the Brookwood gang group were not
16 accepting him because he was not a Blood in that group; and
17 so, they were not accepting him and that was the problem. He
18 was becoming a problem because he was claiming to be a
19 Brookwood, whatever they called it, Blood. So the idea that
20 all Bloods and all blood groups are interchangeable is not
21 accurate.

22 Q But as you sit here today you understand that he's a
23 member of the Bloods?

24 A He was certainly a member of the Staten Island Bloods as
25 I recall.

Woods - Cross/McGovern

1 Q Okay, the Staten Island Bloods. He was a member of the
2 Staten Island Bloods?

3 A As I recall.

4 Q And that he's currently a high-ranking member in the
5 Bloods, do you understand that?

6 A I don't understand that.

7 Q Okay.

8 But putting this in your report to the Court that he
9 was claiming Blood membership when he was, in fact, not a
10 Blood that's a little misleading?

11 A That's exactly what was happening and that's exactly how
12 Mr. Hall described it to me because he described him as
13 flagging in Brookwood and the other members of the gang in
14 Brookwood were not willing to accept him and it was becoming a
15 problem. That's exactly how he described it.

16 Q And that's exactly what your report doesn't say; right?

17 A Yes.

18 Q Your report doesn't say that your report says that he was
19 claiming to be a Blood when he wasn't a blood. Did I misread
20 that?

21 A You did not misread that but within the context of
22 Brookwood, yes.

23 Q When did you get this more fulsome explanation of the
24 intricacies of his Blood membership was this a phone call that
25 you made last week?

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1 A No, sir, it was not.

2 Q So it appears that when youre evaluating him you realize
3 that he's a long-term member of a violent street gang and
4 youre not really saying that in your report. It doesn't say
5 that in your report, does it?

6 A It says exactly what Mr. Hall described to me. He was
7 flagging as a Blood. They said he was not a Blood, they would
8 not let him in. They saw that as a function of his attempts
9 to be part of this group that they were not allowing him to be
10 a part of.

11 (Continued on the next page.)

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Woods - Cross/McGovern

1 BY MR. McGOVERN:

2 Q Okay. Under your understanding of personal roles and
3 responsibilities --

4 A Yes.

5 Q -- you said that he understood that a man who had his
6 arms cutoff couldn't sign a check?

7 A Yes.

8 Q And he understood that was impossible. That was pretty
9 good. Right?

10 A Pretty good?

11 Q Well, he got it right.

12 A He got it right.

13 Q Okay. He also got it right that if someone died as a
14 result of the flu, they couldn't get the flu again. Right?

15 A Yes.

16 Q He got that right. But he wasn't able to answer your
17 questions about the relationship between the gulf stream and
18 the iceberg. Right?

19 A That's correct.

20 Q And that's because he had no idea what the gulf stream
21 was. Right?

22 A That's correct.

23 Q He didn't even know that much about the iceberg. Right?

24 A That's correct.

25 Q Wouldn't you agree that those types of questions are hard

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1 for somebody who doesn't really have that much formal
2 education?

3 A I think it's hard for someone that has -- that is mildly
4 mentally retarded -- may I finish.

5 Q No, please.

6 A That's mildly mentally retarded and doesn't have the
7 information, lack of information base. I don't think it
8 necessarily relates to education. I think it relates more to
9 someone's willingness to educate themselves, watch TV. I see
10 guys in jail that watch the various documentaries, discovery
11 channel, et cetera, they may have that information. He did
12 not have that information.

13 Q All right. So he got -- that was evidence that you put
14 down about his failure to understand personal roles and
15 responsibilities. Right?

16 A No. Actually, what I said was he also did not have
17 enough data to answer questions about the gulf stream melting
18 the iceberg; I did not count that in the negative. I said he
19 did not have enough data to answer the question.

20 Q You put it in your report because you thought it was
21 significant. Right?

22 A I said he also did not have enough data to answer the
23 question. I did not say that somehow cognitively he was too
24 impaired to answer the question. I said he did not have
25 enough data to answer the question about the gulf streams

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1 melting the iceberg.

2 Q So for the reader of this report are we supposed to take
3 this as a positive about him or negative, that he doesn't have
4 enough data about the gulf stream and the icebergs?

5 A It's actually neutral. He doesn't have the data.

6 Q Okay, it's neutral.

7 So you then ask him questions that you -- you asked
8 him to count backwards from 103, starting with 100, by sevens.

9 A I asked him to start at 100 and count backwards; and his
10 first response was 103.

11 Q So you asked him to count from 100 backwards by sevens.
12 Right?

13 A Correct.

14 Q And the -- and he started with 103?

15 A Yes.

16 Q Okay. Did it cross your mind that he might be
17 malingering at this point?

18 A Absolutely not.

19 Q Because a person with mild mental retardation when you
20 say start at a hundred, it wouldn't be unusual for them to
21 mess up the very basic instruction of what you just asked them
22 to do. Right?

23 A Mr. Williams [sic] had difficulty with multiple
24 instructions, although he could get them eventually correct.
25 And if you look at the rest of the instructions that I gave

Woods - Cross/McGovern

1 him, once I gave him instruction or gave it to him again, he'd
2 be able to do it. Even in this circumstance. Even though he
3 started at 103, and got it incorrect, got to 93 he took ten
4 off, he actually got it from that point on. So that's not
5 consistent with someone that's attempting to malingering. As I
6 went through my mental status examination, there was no
7 evidence of him attempting to feign responses.

8 Q You didn't test him for malingering. Right?

9 A You mean did I use a malingering instrument?

10 Q Yes.

11 A I don't use malingering instruments.

12 Q All right. Did you -- have you -- you read the testimony
13 of Dr. Drob in this case. Right?

14 A Yes.

15 Q Dr. Drob testified on cross-examination that based on his
16 review of the defendant's RBANS test on the list naming of the
17 portion of the RBANS test --

18 A Yes.

19 Q -- that the defendant did poorly on the list naming
20 portion of the RBANS test. Did you agree with that?

21 A I don't recall that. Could you show that to me.

22 Q Well, how about this: From your review of Dr. Drob's
23 testimony, did you read that Dr. Drob had concerns based on
24 what he was shown in this courtroom about the defendant
25 malingering on some of the tests or potential malingering on

Woods - Cross/McGovern

1 some of the tests that he had administered to him back in
2 2003?

3 A I don't recall Dr. Drob having questions about
4 malingering. I'd be more than willing to look at his
5 report --

6 Q That's fine.

7 And then on executive function you asked the
8 defendant if he believe flying from New York to California was
9 fewer miles as well as shorter time than driving -- excuse me.
10 He believed that flying from New York to California was fewer
11 miles as well as shorter than -- a shorter time than driving?

12 A That's correct.

13 Q And that is that wrong?

14 A He believed flying from New York to California was fewer
15 miles as well as a shorter time when you were driving. So he
16 believed that flying was not only fewer miles but, of course,
17 that it was a shorter time.

18 Q I don't want to reveal too much here. Is he wrong or is
19 he right on that one?

20 A Yeah, he -- he's correct in a sense, that -- that he
21 believed that flying from New York to California was fewer
22 miles. That's correct. What he -- that's correct.

23 Q Okay. That's a hard question, isn't it?

24 A How far is it from California to New York?

25 Q Is it fewer miles flying from California than driving to

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1 California?

2 A That was not the question that I asked. The question
3 that I asked is how far is it from California to New York, the
4 rest of it was his response.

5 Q Okay. Well, you then criticize his response when you
6 asked him how he would get from Staten Island to
7 Colleen Brady's office. Right?

8 A Yes.

9 Q And basically he said, you take the ferry or he was able
10 to get -- he was able to get to the subway and said, then you
11 take the subway that takes you to Colleen's office. Right?

12 A Yes.

13 Q He's been in jail since 2003. How does he know where
14 Colleen Brady's office is?

15 A He didn't know the trains to get from the ferry to
16 Manhattan -- I mean, in order to get to Manhattan. He had
17 come to Manhattan with Monica Cook over the course of a year,
18 a year and a half. She had to actually stay on the telephone
19 with him to get him from Staten Island to Manhattan to Harlem.

20 Q Okay.

21 A So it wasn't that I expected him to go directly to
22 Colleens office. What I did expect him to be able to give me
23 the accurate trains.

24 Q All right.

25 Doctor, I'm just asking these questions because some

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1 of these questions appear to be hard questions to answer. Do
2 you think that these are hard questions to answer?

3 You could say yes or no.

4 A It depends on the question.

5 Q That question about how he got to Colleen Brady's office,
6 you would agree that's not a good question for a person who's
7 been in jail for the last ten years. Right?

8 A I don't think it would be a problem for him to tell me
9 how to get from the ferry and give me a train number or letter
10 to Manhattan. Did expect him to give me the exact location to
11 Colleen Brady's office. I would have been more than willing
12 to accept direction to Manhattan.

13 Q You have no information about what he knows about lower
14 Manhattan. Right?

15 A Getting to Manhattan?

16 Q Yeah.

17 A He got to Manhattan fairly often with Monica Cook. She
18 lived in Harlem.

19 Q But where is Colleen Brady's office?

20 A It's in lower Manhattan.

21 Q You had absolutely no credible data that suggested that
22 that defendant has been to Colleen Brady's office, ever, in
23 his life. Right?

24 A I didn't anticipate him getting to Colleen Brady's
25 office, I anticipated him getting to Manhattan. I knew he

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1 could not get to her office. It was getting to Manhattan that
2 was the issue.

3 Q But your report --

4 A Because --

5 Q -- report is critical of his statements about taking
6 this -- going to the subway and then taking whatever subway
7 goes to Colleen Brady's office. Right?

8 A Actually, when I said this to him, when I gave this to
9 him, I was asking for specific, how do you get to Manhattan.
10 And he gave me, getting on the ferry.

11 You get to the ferry. You take the subway. That's
12 all he could tell me. I credited him for that.

13 Q Okay. In abstraction, you said that he knew that a
14 banana and an orange were both fruit. Right?

15 A Yes.

16 Q And he understood that a bicycle and car were both forms
17 of transportation?

18 A Correct.

19 Q However, he said that a watch and ruler, both in
20 quotations, had numbers?

21 A Correct.

22 Q What was the right answer?

23 A They both measure.

24 Q So that's the answer you wanted?

25 A Yes.

Woods - Cross/McGovern

1 Q You would agree that that's a difficult question, is it
2 not?

3 A I would not agree, sir. I would not agree.

4 Q That --

5 A What we're really seeing, what we're really seeing here
6 in his executive functioning, is going from simple answers to
7 more complex answers. That's exactly what the mental status
8 is about.

9 You provide him with relatively simple answer --
10 questions, and then you walk down into more complex questions
11 to determine what his level of cognitive function is.

12 Q Okay. And you did a full adaptive workup on this
13 defendant. Right?

14 A Oh, no.

15 Q No?

16 A Oh, no.

17 Q You didn't?

18 A Oh, no.

19 Q So you would have liked to have done more?

20 A Not adaptive functioning. On him?

21 Q Yes.

22 A No.

23 Q Not with him, you didn't do an adaptive functioning
24 interview with him. Right? That would be forbidden?

25 A Right.

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1 Q So what you did was you did an analysis or assessment of
2 his adaptive functioning. Correct?

3 A Yes.

4 Q By talking to all those folks that you described to us on
5 cross-examination. Correct?

6 A I'm not sure who all I described, but yes.

7 Q Okay. And we've already talked about some of the bias
8 issues that people who -- who you interviewed may have had.
9 Right?

10 A I don't think we've discussed it. You mentioned that
11 they may have bias.

12 Q But you didn't deal with that in your analysis in your
13 report, that these people may be biased in his favor so as to
14 give him ratings that may help him avoid the unfortunate
15 punishment that he could potentially be facing in this case?
16 Right.

17 A I did that as part of my analysis.

18 Q Okay. And did you account for the failure of his
19 opportunity to have certain types of adaptive functioning?

20 A Yes.

21 Q Right. I mean, the AAIDD says in it that when you
22 assessing adaptive functioning, you have to assess whether or
23 not the person has had the opportunity to be involved in
24 certain functions. Correct?

25 A Yes.

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1 Q And you did that in your report. There are areas that
2 you knocked out that said he doesn't have deficits in that
3 area because he didn't have the opportunity to live alone or
4 to work. Did you do that in your report? I didn't see that.

5 A I don't see where those -- you'd have to be more
6 specific. I don't see where those deficits would be.

7 Q Well, is it your view, then, that he had all the
8 opportunities that would have permitted him to participate in
9 all the functions that the AAIDD contemplates?

10 A He certainly -- if you're being specific about -- because
11 the AAIDD does not, for example, does not say that one has to
12 live alone. They say you have to live independently. That's
13 different than living alone.

14 Q But he didn't do that. Right?

15 A Live independently?

16 Q Yes.

17 A He lived with Monica Cook, he lived with Vanessa, he
18 lived with his mother. Those are -- that is not living alone,
19 but it gives you an opportunity to evaluate how he functions.
20 You don't have to live alone.

21 Q But you found deficits for him in home living. Right?

22 A Absolutely.

23 Q Absolutely. Okay. So the fact that he didn't ever
24 actually live alone was not a bar to you finding a deficit in
25 home living. Correct?

Woods - Cross/McGovern

1 A Because living alone is not the bar.

2 Q Okay.

3 A Living independently is the bar and then looking at -- if
4 he is living with someone, looking at how he functions with
5 that person.

6 Q Do you -- beyond that --

7 A I'm sorry, may I finish. I apologize.

8 Q Oh, I thought you were done.

9 A Yeah, it's not living alone, it's living independently.
10 You can live independently with another person. You could
11 have a roommate. You can share things with a roommate. You
12 could have a loved one. You can share things with a roommate,
13 with that loved one. That can be an independent living. It's
14 not living alone necessarily.

15 Q Okay, you finished with that one?

16 A Yes.

17 Q Okay. You also failed to account for later deficits.
18 Right?

19 A Well, first of all, I don't think I failed to account for
20 that. I apologize if I misunderstood. I did account for that
21 and perhaps you -- maybe I didn't make myself clear. But I
22 did account for it.

23 Q Let me make myself clear. I'm talking about the fact
24 that Lillian Barnes, by her own admission, says that she
25 believes that she's got intellectual disability.

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1 A That's not what she said.

2 Q She said she's intellectual deficit?

3 A She said she was intellectually limited.

4 Q By intellectually limited, you take that to mean that she
5 was mentally retarded?

6 A No. I took that to mean that she had limitations. She
7 only went to the ninth grade. However, she was able to get a
8 driver's license. She certainly was able to interact with
9 Mr. Wilson's school, as well as his hospital.

10 But she saw herself as not being able to provide
11 things like academic help for him. So that's what I see as
12 being intellectually limited in the way that she describe it.

13 Q So intellectually limited, in that she only went to the
14 ninth grade. Right?

15 A And she had academic difficulties?

16 Q Okay. Did the defendant's mother go much further than
17 ninth grade?

18 A No. I think she actually went to maybe ninth or
19 tenth grade.

20 Q All right. And did you find -- did you state in your
21 report that she had intellectual limitations?

22 A I didn't believe she had intellectual limitations.

23 Q So upon meeting Ms. Barnes, you as a trained psychiatrist
24 felt that there was some corroborating evidence that she had
25 intellectual limitations. Correct?

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1 A She told me that.

2 Q Well, she told you and then you observed her and spoke to
3 her, what appears to be several hours, and you -- what you saw
4 corroborated with what she told you. Right?

5 A To some degree, yes.

6 Q And so whatever she told you, you put in your report as
7 well. You have numerous references to what Ms. Barnes told
8 you about the defendant's adaptive abilities. Right?

9 A Yes.

10 Q And you just reported whatever she said about his, his
11 ability to go to school or his ability to do different
12 functions around the house, you reported that in your report.
13 Right?

14 A I'm not sure I reported whatever she said but I tried to
15 report some things that she said.

16 Q And you think that's perfectly fine, to take a person
17 that has intellectual deficits themselves and use them as a
18 reporter on whether or not the defendant suffers from
19 intellectual deficits?

20 A I absolutely think that it's perfectly fine to use
21 someone that is able to give an accurate history that is able
22 to describe to them how their deficits interacted. She said
23 she couldn't help him with his homework so she let her
24 daughter, his cousin, help him with his homework. The idea
25 that someone that has intellectual deficits somehow can't

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1 provide that type of information is very, very inaccurate.
2 You have to assume and try to get to some understanding of how
3 that person -- what that person's history can provide. And
4 luckily I had records at which she took him to the hospital;
5 records in which she took him to his meetings with his
6 therapist; records of when she met with the school; records in
7 which people describe her as having limitations as well.

8 So the idea that because she may have some
9 intellectual limitations, she could not provide adequate
10 adaptive functioning is, is very, very wrong.

11 Q And you review all the deficits in your report. Correct?

12 A I think the ones that she told me about, yes.

13 Q I want to talk to you about your diagnosis in this case.
14 That's on page 21. You diagnosed the defendant as having a
15 cognitive disorder. Is that right?

16 A Yes.

17 Q And as documented by Dr. Jane and Dr. Drob. Is that
18 right?

19 A Yes.

20 Q And Dr. Drob identified the defendant as having a
21 cognitive disorder?

22 A No.

23 Q Did Dr. Drob identify the defendant as having
24 intellectual disability?

25 A No. But that's not what that says. I didn't say that

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1 Dr. Drob diagnosed her. I said documented by Dr. Drob and
2 Dr. James neuropsychological testing.

3 Q So you're talking about the IQ test that Dr. Drob gave?

4 A I'm talking about the Halstead-Reitan testing, as well as
5 the RBANS testing that he did.

6 Q Well, what are the IRQ test that he gave the defendant?
7 Is that showing the existence of cognitive disorder?

8 A Intellectual disability doesn't in and of itself make the
9 diagnosis of cognitive disorder. A cognitive disorder is
10 separate from intellectual disability.

11 Q But -- all right. Are you -- are you using Dr. Drob's IQ
12 test to diagnosis the mild mental retardation?

13 A I think that Dr. Drob's test is within the --
14 particularly his Flynn test, it was within the ballpark for
15 making the diagnosis of mild mental retardation.

16 Q So you're relying on Dr. Drob's IQ test?

17 A I wasn't saying I was relying on it. I'm saying that his
18 IQ test is within the standard that would be used for making
19 the diagnosis of mild mental retardation.

20 Q So you don't rely on Dr. Drob's IQ test for mild mental
21 retardation?

22 A I reviewed Dr. Drob's IQ test. The test that I feel are
23 most relevant, in terms of making the diagnosis, are tests
24 that we have a battery that we can assess, which would be
25 documentaries -- no, I'm sorry, maybe I'm -- maybe I'm

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1 confused.

2 A Halstead-Reitan is not an IQ test. The
3 Halstead-Reitan is a neuropsychological test that, and RBANS
4 are not an IQ test, it's a neuropsychological test. So
5 neither of those tests are IQ tests.

6 Dr. Drob did another IQ test. Unfortunately, we
7 don't have the full battery. I know I have Dr. Nagler. I'm
8 sorry, we do -- I have Dr. Nagler and Dr. Drob and Dr. Denney.

9 Q So you want to withdraw that?

10 A Yes.

11 Q So let's go back in time and make believe you didn't just
12 say that the reason you're not relying on Dr. Drob is because
13 you don't have all of his raw data. Right?

14 A Yes, we do have his raw data.

15 Q So let's start again. Doctor, would you tell me now why
16 you're not relying on Dr. Drob's test?

17 A For the cognitive disorder or for the IQ?

18 Q For the IQ.

19 A I apologize. I just looked at the numbers incorrectly.

20 Q We all make mistakes.

21 A Dr. Nagler, Dr. Drob, and Dr. Denney are the three that I
22 would rely upon.

23 Q So you would rely upon --

24 A Yes, I apologize.

25 Q That's an important thing. So I'm glad we got that

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1 straightened out. So you actually are relying own Dr. Drob's
2 IQ test?

3 A Yes.

4 Q So you're relying on any of these -- relying on
5 Abramson's IQ. Right?

6 A Correct.

7 Q That's an 84 full scale?

8 A Correct.

9 Q And you're either not relying on Carla Drezner's IQ
10 because that's a 78?

11 A Yes.

12 Q And the problem with Drezner, you don't have the raw
13 data?

14 A Or Dr. Abramson's.

15 Q You're not relying on that because you don't have the
16 data?

17 A I can't assess it, that's correct.

18 Q But didn't assess it. Right?

19 A But you -- If you don't have it you can't assess it.

20 Q That's probably true. But the point is you actually
21 didn't do it. Even with Dr. Nagler, you didn't assess
22 Dr. Nagler's IQ data, did you?

23 A I looked at Dr. Nagler's IQ data and I also looked at
24 his -- well, I looked at his report. Not his report but his
25 sheet that have the scores on it.

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1 Q It's a sheet?

2 A Yeah, the sheet that had his scores on it. I didn't look
3 at his raw data, I just looked at his subtest scores and I
4 looked at his neuropsychological data.

5 Q So you looked at Dr. Nagler's scores. Right?

6 A Yeah, the scores.

7 Q But you didn't look at Dr. Nagler's raw data. Right?

8 A I don't recall if I looked at his scores.

9 Q Okay. But that's what you do. Right? In standard
10 psychiatric practice, if somebody refers somebody from a
11 psychologist to you, you look at the reports that are prepared
12 by the psychologist. Right?

13 A It depends upon what I'm looking for. If I have raw data
14 I will look at that raw data. It doesn't -- I'm not an
15 expert, so that doesn't mean that I will administrator tests.
16 But if I have the raw data, then I'll try to look at that.

17 Q But here, for some reason you didn't look at the raw data
18 for Dr. Nagler. Right?

19 A I note that I looked at the raw data for doctor-- we have
20 raw data subscores. I have subscores for Dr. Nagler, I have
21 subscores for Dr. Popp -- no, Dr. Drob and subscores for
22 Dr. Denney. That's what I looked at.

23 Q You had the subscores for just about every one of those
24 IQ tests. You realize that. Right?

25 A What I don't have all of the raw data to allow me to

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1 thoroughly examine what those subscores mean. Whether they
2 were properly administered, et cetera.

3 Q I don't want to beat this any further. You're testifying
4 here in federal court, in a death penalty case, that saying
5 that the only reason we can trust Dr. Nagler is that she's got
6 raw data. Right?

7 A Yes.

8 Q And your testimony is that while in your private practice
9 you would review raw data, here you didn't. Is that right?

10 A No, sir, that's not what I am saying. What I am saying
11 is that when I looked at the raw data with Dr. Nagler,
12 Dr. Drob, and Dr. Denney, I looked at the subscores first and
13 then I looked at what raw data is available.

14 Q Okay. And so the subscores are available for everyone of
15 those IQ tests. You understand that. Right?

16 A No, that's not correct.

17 Q You're view -- your review of this is -- is different
18 than that -- You don't believe that each one of these IQ
19 scores has paperwork that shows how he performed on each
20 underlying subtest?

21 A Each except for Dr. Frank's. And Dr. Frank's, I believe
22 he only did four of the testing. So it's not available for
23 each one of them.

24 Q But I'm -- let's talk about your standard of practice.
25 You have patients. Right --

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1 A Yes.

2 Q -- you just told us about. This standard of practice
3 is -- in your practice is to review the work of other
4 psychologists when -- when their work gets sent to you, if
5 it's germane to what you're trying to assess. Right?

6 A Yes.

7 Q All right. And the general practice, good practice is to
8 rely on psychiatric, psychological testing, such as IQ scores,
9 based on what is provided to you by the psychologist. Right?

10 A No.

11 Q No. That -- do you -- You don't treat other
12 psychologists with the presumption that they are doing the
13 right thing and doing it correctly?

14 A I certainly treat them with the presumption that they are
15 attempting to do the right thing and that they are attempting
16 to score the information as accurately as possible. The
17 difference with Dr. Nagler, Dr. Drob and Dr. Denney, is that
18 there is -- there was data to support their subtest scores.

19 Q Okay. So that's why you rely on them. Right?

20 A Yes.

21 Q But you don't rely on any of the other IQ scores. Right?

22 A I don't think I'm in a position to rely on any of the
23 other scores.

24 Q Do you realize that Dr. James testified in this courtroom
25 not so very long ago and said that she was actually willing to

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1 consider all of the IQ scores, and she wasn't denigrating
2 anyone's in particular.

3 Did you read that in your review of the testimony?

4 A That's a different question, sir.

5 Q Okay.

6 A I certainly considered the scores and that's what I --
7 when I say I look at the subtest, I certainly considered the
8 scores and I certainly considered each of those scores. But
9 in terms of being able to rely upon them, the only ones I
10 could rely upon were those that in fact had raw data.

11 Q And that's because of your independent assessment of the
12 raw data. Right?

13 A I could look at the raw data and I could also look at the
14 subscores, and it would give me subsense. But I couldn't do
15 that with just the subsense.

16 Q And you testified, and you're testifying right now, that
17 you actually reviewed all the raw data for all those IQ tests.
18 For Dr. Nagler's IQ test, you reviewed that raw data, didn't
19 you?

20 A That was my understanding, sir, yes. Dr. Nagler,
21 Dr. Drob, and Dr. Denney.

22 Q Dr. Woods, with all due respect, did you review the raw
23 data for Dr. Nagler's test, yes or no?

24 A Dr. Nagler's test?

25 Q Yeah, Dr. Nagler's test?

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1 A Oh, I believe -- I apologize, I'm confused. I believe it
2 was Dr. Nagler, Dr. Drob, and Dr. Denney that I in fact
3 reviewed.

4 Q Okay. And you're sure about that?

5 A I'm frankly not -- I'm sure about Dr. Drob and
6 Dr. Denney, I'm not as sure about Dr. Nagler.

7 Q In your diagnosis of the defendant, you didn't put in any
8 diagnosis of antisocial personality disorder. Right?

9 A That's correct.

10 Q And you didn't put in any reference to learning
11 disabilities. Right?

12 A Correct.

13 Q You didn't put any reference to attention deficit
14 disorder. Right?

15 A Correct.

16 Q And attention deficit disorder, you agree that his
17 records are replete with reference to attention deficit
18 disorder. Right?

19 A Yes.

20 Q But you didn't put that in. Right?

21 A That's correct.

22 Q Because you didn't think he had attention deficit
23 disorder?

24 A That's correct.

25 Q What happened, did he grow out of it?

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1 A I think it was an inaccurate diagnosis.

2 Q And so that little veinlet that you shared with us on
3 direct, that the one admitting physician saying something
4 about he -- the defendant doesn't have attention deficit
5 disorder and then the attending or another doctor said that he
6 had classic signs of ADHD, you didn't credit that person who
7 said he had classic signs of ADHD. Right?

8 A I didn't view either one.

9 Q And you didn't make up the diagnosis. Right?

10 A That's correct.

11 Q Because it's all about mental retardation here. Right?

12 A No.

13 Q Well, you could have, under my understanding of your
14 description of co-morbidity, there wouldn't have been any harm
15 in putting ADHD as a co-morbid diagnosis. Right?

16 A If it existed, it wouldn't have been any harm, that's
17 correct.

18 Q Actually, ADHD happens often with people with mild mental
19 retardation. Right?

20 A It can, yes.

21 Q So it wouldn't have done any harm to your diagnosis.
22 This defendant could still have been mentally retarded and had
23 ADHD. Right?

24 A Yes.

25 Q But you didn't put that in your report. Right?

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1 A That's correct.

2 Q Because your view that they misdiagnosed it, "that" being
3 they, all the professionals who saw him over the years, they
4 misdiagnosed the ADHD. It was just actually more stated as
5 mild mental retardation. Right?

6 A That's correct.

7 Q That was your view. Right?

8 A Yes.

9 Q And you're very comfortable coming in here and second
10 guessing all of those professionals who oversaw the defendant
11 all those years?

12 A I don't feel as though I'm second guessing, I feel as
13 though I have more data.

14 Q Second guessing is not right. You're just testifying
15 that they're wrong. Right?

16 A I'm testifying that within the confines of their
17 information, that was the diagnosis that they came up with,
18 and I disagree with that.

19 MR. MCGOVERN: Okay, I don't have anything else for
20 you, Doctor.

21 THE WITNESS: Thank you.

22 THE COURT: Let me ask a question, not of the
23 witness but of the parties.

24 With regard to the raw data, for whom do we have the
25 raw data? Nagler, Drob, and Denney only?

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1 MR. BURT: Correct, your Honor. In terms of the
2 testing booklets, we have subtest scores for some of the other
3 examiners.

4 THE COURT: That, I know.

5 MR. BURT: The testing, just the three that the
6 Court just mentioned.

7 THE COURT: And what efforts were made to obtain raw
8 data by the parties?

9 MR. BURT: Extensive efforts. And we can put on
10 evidence about that, if the Court would like.

11 We made multiple attempts through various sources to
12 track down these documents. I believe we have replies from
13 the record holders indicating, and it's in the record,
14 actually, for each set of records what they had and what they
15 didn't have.

16 THE COURT: And what about the government, anything
17 to add to that?

18 MR. McGOVERN: We don't have anything to add. Your
19 Honor, we've been sort of hand strung on our ability to get
20 these items over time. Because as the Court may remember,
21 just on the length and history of the case, the production was
22 made by the Capital Defender's office to the Staten Island
23 District Attorney's office back in '03 and presumably those
24 people over at the Capital Defender's office were the ones who
25 took first crack to get the documents, I would imagine,

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1 rather, to obtain such documents it would have involved, you
2 know, releases from the defendant and other sorts of, you
3 know, defense involvement to get those documents.

4 But since the onset of this Atkins litigation, we've
5 been kind of, not at the defense's mercy, but they are the
6 ones who are providing us with the documents because we can't
7 look in our own file. We were limited in our ability to look
8 into this file into the mental health information.

9 MR. BURT: I just add to that, your Honor, when I
10 first came into the case in March of 2010, I started making
11 sure that the government had all the information that we had.
12 I also had a telephone conversation with Mr. McGovern
13 indicating that if he had other ways to get at documents that
14 we didn't have, that I would facilitate through waivers or
15 whatever else he needed to get the documents that we didn't
16 have.

17 I believe we have everything that's out there. We
18 certainly tried to cooperate with the government in following
19 up with their investigation. And I can represent to the Court
20 that extensive efforts were made to track down all the testing
21 material. And that at this point we believe we have
22 everything there is out there.

23 Ms. Brady reminded me that those efforts did include
24 general counsel through the Department of Education trying to
25 track these records down as well. So we were both at the

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1 record custodian level and at higher levels in the legal
2 departments of various agencies trying to make progress.

3 THE COURT: When you say, "the Department of
4 Education", that's the New York City Department of Education?

5 MR. BURT: Yes, your Honor.

6 THE COURT: And were all of the institutions in
7 which the defendant was a resident or involved new York City
8 run institutions?

9 MR. BURT: Except the state organization.
10 Brookwood, for instance, I think is a state agency. But all
11 of the school systems were New York City school related, I
12 believe. We were informed, your Honor, that the policy is
13 that the records follow the student.

14 The last school system he was in, the last school he
15 was in was in Far Rockaway. We made efforts to try and
16 determine through the general counsel's office where they had
17 warehoused the records and we were unsuccessful in tracking
18 the records down, other than what we have before the Court.

19 THE COURT: Okay.

20 MR. BURT: There was also some indication very early
21 on that there was some disability determination throughout the
22 social security agency, through SSI. We also made efforts to
23 try to obtain those records and were told they have been
24 destroyed.

25 THE COURT: All right. Thank you. Redirect.

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1 MR. BURT: Thank you.

2 THE COURT: About how much redirect do you have?

3 MR. BURT: Not very long; half an hour.

4 REDIRECT EXAMINATION

5 BY MR. BURT

6 Q Doctor, you were asked some questions about assessing
7 bias, the bias of family members in the case and bias of
8 Mr. Wilson.

9 A Yes.

10 Q Is this a case where you had to rely on the information
11 provided by Mr. Wilson or his family in order to assess either
12 intellectual functioning or adaptive deficits?

13 A It was less important to examine intellectual functioning
14 as would be to examine adaptive deficits.

15 Q Okay. And would it be fair to say that you interviewed
16 as many family and friend members as you could find?

17 A Yes.

18 Q You also, a point was made that where Dr. Patterson
19 interviewed Mr. Wilson once, you interviewed him six times.
20 Is there some reason why you needed to interview him more than
21 once?

22 A Yes. As I said before, when you look at someone over
23 time, you're able to get a better sense of their functioning
24 over time and that's particularly true when someone is in a
25 custodial setting. They are in a highly structured setting,

Woods - Redirect/Burt

1 their options very limited. People in custodial settings can
2 often look better, can't present because they got supports
3 that -- you know, they eat at a certain time, they sleep at a
4 certain time, they go to do certain things at a certain time.
5 They're given things rather than having to go out into the
6 world and deal with those kinds of things. And so because of
7 that, they can often look better in a custodial setting than
8 they would look out in independent living in the community.

9 Q And is it your understanding in this case that you were
10 trying to assess Mr. Wilson's intellectual functioning and his
11 adaptive behavior deficits at the time of the crime in 2003?

12 A Yes.

13 Q Okay. What role did the records play that you had,
14 approximately 10,000 pages of records, what role did those
15 records play in helping you assess whether the information you
16 were getting from family was accurate, in terms of his
17 deficits?

18 A Well, the records describe symptoms throughout the
19 records. In the school, for example, they describe periods of
20 good behavior. They describe periods of not so good behavior.

21 The medical records, again, really allowed me to
22 separate out to what degree there was a mental illness here
23 versus behavior that would be consistent with mild mental
24 retardation or if there was a play between the two.

25 The records allowed me to see if there had been

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1 other types of evaluations that were done. When you look
2 through Mr. Wilson's records, what you see is that there were
3 no psycho -- neuropsychological evaluations. There were
4 neurological evaluations, but those are not the same as
5 neuropsychological evaluations. They don't get the cognitive
6 behavior and cognitive thinking.

7 Q My question is: What did the records show in terms of
8 deficits?

9 A The records show deficits in communication. The records
10 showed that Mr. Wilson from an early age had problems
11 communicating with others, that he had problems making
12 friends, that he had problems following directions. As early
13 as kindergarten, first grade, they described him as having
14 difficulty following directions. And I saw that in my
15 evaluation.

16 Ms. Aaron son described him as having -- as
17 asserting words and taking words out in the same type of error
18 that I saw in my evaluation. And this was very, very early
19 on, 1989, 1990.

20 Q Now, did you think that people like Ms. Arrow son had a
21 bias in terms of whether they were accurately reporting
22 deficits?

23 A No.

24 Q Did you attach any significance to age of which these
25 deficits first started to appear in the record?

Woods - Redirect/Burt

1 A Yes. One of the real advantages that we have is that we
2 have records from the age of six and -- actually from
3 kindergarten, from five. But we have testing that starts
4 around the age of six, and these records go on until he's 12
5 or 13 years of age. So many of the symptoms that we saw that
6 the family described, other family members calling him or
7 other people in the community calling him spesh, calling him
8 retard were also in the medical records.

9 Q In other words, that's not the story about people calling
10 him spesh and retard, that is documented in the records as
11 opposed to getting that information from a family member years
12 later?

13 A That's correct.

14 Q Okay.

15 A It's also one of the other things that's in the records
16 is his difficulty in articulating, in being able to describe
17 circumstances. I believe it was Dr. Frank who said, he asked
18 her -- he asked him about his aunt and could he give you a,
19 something that was good about her and could he give you a --
20 something that was good about her and something that was
21 negative about her. And this was 1997. And Mr. Wilson was
22 not able to give him that kind of information. So it really
23 reflects what we call a possibility of thought, that even
24 though as Dr. Grant noted, he is coherent, his thinking is --
25 was very simplistic. And that is Dr. Grant. This is exactly

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1 what the family -- some family members said as well.

2 Ms. Hogan, for example, Ms. Hogan Barnes described
3 how Mr. Wilson would stand when there was a problem, how he
4 would stand there without talking to her. And Corey would
5 come over and say, well, Ronell needs this or here's his
6 problem or here's that problem. That kind of inability to ask
7 for things or acting out rather than asking for things were in
8 the records as well.

9 Q Now, evaluations that were done, for instance,
10 Dr. Frank --

11 A Yes.

12 Q -- did he note in his report when he evaluated him, I
13 believe in 1997, that he had intellectual deficits?

14 A Yes.

15 Q And was that based on any bias he had, or was it based on
16 the testing he had?

17 A I think it was based upon his interview with him, as well
18 as the testing that he had available.

19 Q Did you think he had any bias or incentive to say
20 Mr. Wilson had intellectual deficits when he didn't?

21 A He was actually testing for the courts. I don't see how
22 he would have -- I don't see what bias he might have had.

23 Q And did Mr. Wilson in 1997 have the incentive to avoid
24 the death penalty?

25 A No.

Woods - Redirect/Burt

1 Q He certainly didn't have the incentive at age six, did
2 he?

3 A No.

4 Q Were you seeing in the records at age six the kind of
5 deficits you were still seeing in 1997?

6 A Yes.

7 Q What did that tell you about the persistence of the
8 deficits and when they started and how long they lasted?

9 A Well, it tells you that there is an internal consistency
10 with these deficits. The academic deficits that you saw at
11 age six, even though they were less apparent, were still
12 there. By the time that -- in 1997, you saw that these
13 deficits hadn't -- had remained. He was four or five years,
14 in some places six years behind academically.

15 You saw some of the behaviors that had been there at
16 age six, not being able to communicate effectively, that --
17 it's not that he couldn't communicate, but certainly not being
18 able to communicate effectively were still there.

19 And I think Dr. Swadesh Grant, in her January 1997
20 report, really says it when she says that his language was
21 simple and coherent. So it was coherent but it was simple.
22 And that's really what we see over time, that he is able to do
23 certain things but as you move deeper into them, they become
24 more problematic for him.

25 Q All right. Now, you were asked questions about a

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1 historical diagnosis that was reached of oppositional defiance
2 disorder and why you didn't agree with it?

3 A Yes.

4 Q May I approach the witness, your Honor?

5 THE COURT: Yes, you may.

6 Q Showing you Exhibit C-1 page 105. Do you remember the
7 very first psychiatric evaluation that Mr. Wilson got at age
8 six from a resident by the name of Dupre?

9 A Yes.

10 Q And is page 105 the beginning of his -- do you see where
11 it says Resident Dupre, D-u-p-r-e?

12 A Yes, Dr. Dupre saw him for a while.

13 Q And tell us -- and then it says resident, he's the one
14 that signs a report eventually and then there's an attending.
15 Do you know how that works in terms of what level of skill the
16 resident is at at this point?

17 A The resident is still in school and the attending is
18 graduating and is supervising the resident at training.

19 Q Okay. And if you take a turn to page 111 of those
20 records, is the resident, that is S. Dupre, D-u-p-r-e, is this
21 his typed report concerning the first psychiatric examination
22 of Mr. Wilson at age six?

23 A Yes.

24 Q And what is his diagnosis on this page?

25 A Oppositional defiance disorder and academic skills

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1 disorder.

2 Q Okay. And he says in his report, does he not: @ "Our
3 evaluation revealed an uncooperative six-year-old black boy
4 with poor eye contact and keeping his thumb in his mouth at
5 all times. He would answer with a nod of the head. Denies
6 hallucination, suicide, homicide or ideation. Alert and
7 oriented to all three spheres. Patient can be very disruptive
8 at times. His behavior fluctuates from one extreme to the
9 other. He is unpredictable and uncooperative. Needs firm
10 setting and a very structured environment." And then
11 diagnosis, as you say, oppositional defiance disorder and
12 academic skills disorder. Correct?

13 A Yes.

14 Q And his recommendation is: "Patient will return home.
15 Patient should be assessed for placement in special education.
16 We feel patient would benefit from a classroom with a maximum
17 of ten children and should be at on a one-to-one basis with
18 his teacher. Behavioral modification approach should be
19 implemented. Reward when he does well and reinforcement of
20 good behavior." You see that. Correct?

21 A Yes.

22 Q That's the first time someone labeled him with a
23 diagnosis of oppositional defiance disorder. Right?

24 A Yes.

25 Q Now, if you look at Dr. Dupre's written workup, which

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1 begins on page 1 through 9 of page 105 of those same
2 documents. Do you see that?

3 A Yes.

4 Q What does he write down in terms of Mr. Wilson's medical
5 history?

6 A He writes "none." It looks like none.

7 Q None. Okay.

8 However, by this time in Mr. Wilson's life he had
9 been admitted in the hospital and diagnosed with meningitis,
10 had he not?

11 A That's correct.

12 Q Now, what is the significance to not know -- this
13 resident apparently not knowing he had been diagnosed with
14 meningitis?

15 A Well, there are two, Mr. Burt. The first one is when you
16 look at his -- on page 111, and you notice "Earl is a
17 six-year-old black boy admitted for punching his peers without
18 provocation." What you see is really the opposite of
19 oppositional defiance behavior.

20 And this is what you see often during the records,
21 is that there are times when Mr. Wilson, in fact, does act
22 with intent, but there are other times when there's no
23 provocation at all. And oppositional defiance disorder is
24 typically a disorder that defines to authority. It's when
25 someone tells you to do something or someone confronts you and

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1 you, you are defiant of authority.

2 What we see with Mr. Wilson is that -- and what we
3 see here with this record is that Dr. Dupre did not take into
4 consideration the fact that he was acting often without any
5 authority provocation.

6 That's the kind of behavior that you can see when
7 people have impaired executive functioning, and that impaired
8 executive functioning is the frontal lobe of the brain, part
9 of the brain that is not working properly and it prevents them
10 from being able to effectively weigh and deliberate.

11 And that can occur secondary to meningitis.

12 Q Okay. Now, fast forward to 1998 when he's interviewed by
13 Mr. Giglio. Correct?

14 A Yes.

15 Q Is the -- is there evidence of impairment at this stage
16 in his life from Giglio's reports?

17 A Yes.

18 Q And what are they?

19 A Mr. Giglio finds him immature. He finds him academically
20 behind. He finds him extremely needy. He finds him having
21 difficulty, again, following directions.

22 Q Now, does he say in his report at page 4184, "Earl's
23 performance of a WISC-III reveals seriously deficient verbal
24 skills, especially those most depending upon formal
25 education"?

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1 A Yes.

2 Q And does he talk about him being a concrete thinker?

3 A That's correct.

4 Q Do the notes indicate that he acts like a big baby?

5 A Yes.

6 Q And this is many years after he was evaluated when he was
7 six years of age. Correct?

8 A That's correct.

9 Q Does he have any incentive, Mr. Wilson have any incentive
10 at this point to avoid the death penalty?

11 A No.

12 Q What does that tell you when you look at those two
13 snapshots, age six, and 1998 when he's 15?

14 A Well, it's reason why you try to look at this over time.
15 At age six he has these behaviors that are, for lack of a
16 better word, they are behaviors that reflect his impaired
17 thinking. He's described as concrete at Brookwood. He's
18 described as concrete by Dr. Grant in 1997. His thinking
19 early at Elmhurst is also described as concrete. Ms. Guerrero
20 describes his thinking as concrete as well. And she says that
21 she often had to break things down to him because he could
22 not -- he could not understand things. He was very young at
23 that time.

24 We see the same difficulty thinking early on in his
25 life. So we've got an internal consistency of these kinds of

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1 symptoms long before the offense.

2 Q And when you say internal consistency, does this whole
3 analysis depend on Joyce Guerrero?

4 A No.

5 Q That's a red herring, isn't it?

6 A That's correct.

7 MR. McGOVERN: Objection.

8 THE COURT: Sustained.

9 Q And does this whole analysis depend on his Aunt Lou?

10 A No.

11 Q You're placing primary weight in your analysis of
12 deficits on what she told you in 2012?

13 A No.

14 Q By the way, did the other side interview his aunt?

15 A Not that -- I haven't seen any records that they did.

16 Q I'm talking about Dr. Denney.

17 A No, doctor -- not that I know of.

18 Q You've seen the report. Correct?

19 MR. McGOVERN: We'll stipulate that Dr. Denney
20 interviewed Lillian Barnes.

21 THE COURT: All right.

22 MR. BURT: And that he administered an adaptive
23 behavior instrument?

24 MR. McGOVERN: And that he administered an adaptive
25 behavior to Lillian Barnes after the defense identified her as

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1 one of the witnesses that they were relying upon here.

2 MR. BURT: Thank you.

3 THE COURT: All right.

4 Q Is there anything unusual about going to family members
5 in the Atkins context and interviewing them and administering
6 adaptive behavior instruments?

7 A It is the person that -- it is the persons that would you
8 most likely go to in the Atkins and outside of the Atkins
9 context.

10 Q Now, when he was examined by Dr. Drob in 2003, that was
11 after he was charged with a capital offense. Right?

12 A That's correct.

13 Q Looking at the score, 76, do you think he was trying to
14 fake -- to hit that score, one point above a 75?

15 A I don't see how Mr. Wilson would be able to do that.

16 Q Why not?

17 A It would be very difficult to understand test
18 construction in such a way to hit a specific score or -- and
19 that's not what people that malinger do. When you look at
20 malingering, what you often see are extremely low scores
21 rather than --

22 Q Like what kind of scores?

23 A Scores in the 60s.

24 Q So that would be a red flag, that somebody -- if you saw
25 that pattern of scores throughout his history and all of a

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1 sudden he's charged with a capital offense and the score
2 dropped down to 60, what would that tell you?

3 A It would concern me, in terms of effort as well
4 malingering.

5 Q Is that the pattern you see here?

6 A It's a 76. No, it's not.

7 Q When you interviewed Mr. Wilson's relatives, did they --
8 was there some, in your view, some push toward trying to make
9 him look more impaired than he was?

10 A No.

11 Q Was it just the opposite or can you characterize it?

12 A It was -- it was different, depending upon who you talked
13 to. Certainly all of his family members said that there were
14 things he could do and things he couldn't do. They all said
15 that he was a loving person. They all said that he was good
16 within the family. There was some that said he had difficulty
17 with his hygiene, there were others that said he did not.

18 So there was no specific addenda that I was able to
19 ascertain in terms of them saying what he does everything
20 poorly. His -- Ronell -- over time what you really saw was
21 they had looked at him since he was very young and had
22 recognized that he had problems since he was very young.

23 Q Was he -- the green book says take into account culture.
24 Correct?

25 A Yes.

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1 Q Is this case a situation where within his culture people
2 are seeing his behavior as normal?

3 A No. When you look at -- again, looking at family
4 particularly and friends, they clearly saw him as not
5 functioning on the same level as other people within the
6 community. His mother and Monica tried desperately to get him
7 involved to get him work, to get his GED. They took him to
8 get his driver's license and he failed his driving test a
9 number of times.

10 They enrolled him in classes that he was not able to
11 perform. They -- so -- his cousin Vanessa took him to and
12 helped him to try to fill out applications. So what you see
13 is people recognized throughout the family and outside of the
14 family that he had significant deficits even within that
15 culture.

16 Q Okay. You were asked questions about Facebook and
17 e-mails. Do you recall those questions?

18 A Yes.

19 Q In the binder there that's in front you, Exhibit S, do
20 you have that?

21 A Yes.

22 Q Besides your own writings, you have at the very end of
23 there, three writing -- three articles that address the issue
24 concerning what someone with mild MR can do. Correct?

25 A Yes.

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1 Q The first one is "Patterns of leisure participation among
2 adolescents with a mild intellectual disability" published in
3 the Journal of Intellectual Disabilities in 2005. Correct?

4 A Correct.

5 Q Why is this article important to in relation to the issue
6 of Facebook issue, e-mails, communicating in writing, etc.?

7 A This article was important because it showed that people
8 that have mild mental retardation undergo a number of leisure
9 activities, including reading magazines and newspapers,
10 playing musical instruments.

11 And it also noted that the family members described
12 the use of computers as one of the leisure activities. The
13 students, about 58 percent of the students describe themselves
14 as using computers. But the family members, about 73 percent
15 of the family members describe themselves as using computers.

16 Q In your clinical practice, people with intellectual
17 disabilities have the ability to communicate with you by way
18 of computers, e-mail?

19 A Skype, FaceTime, e-mail, yes.

20 Q The second article you have there is "The Use of Computer
21 Technology to Help Students with Special Needs." Correct?

22 A Yes.

23 Q 2000 article in the Children and Computer Technology
24 Journal. Why was that article important?

25 A This article was important because on page 104 it notes

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1 that when they described students with disabilities, one of
2 those students -- one of that group, about 10 percent of the
3 group is with people with mental retardation. And it talks
4 about how communication technologies and word predictions
5 software and things like hyperlinks are not new, that you see
6 students that are able to use these multimedia, and often how
7 students that have learning disabilities, if they're reading a
8 book and it accounts a reference to another book, it allows
9 them to look at that other book. It allows them to normalize
10 their behavior. If they're talking to someone on e-mail, it
11 allows them to normalize their behavior.

12 So we see the people that have mild mental
13 retardation and other disabilities as well can use technology.
14 And that's particularly true when that technology is set up.

15 Q Now, are these people who are out in the community or
16 people who are locked down in secured facilities where they
17 have routines to follow, times when they can go to e-mail?

18 A These are people that are actually in the community.

19 Q And what does that tell you about people who are not in
20 the group, who have mild MR?

21 A People that have the kind of structure, the kind of
22 support system that a correctional facility or other lockdown,
23 if they have access to these, those are the kinds of supports
24 that are really important in making someone with mild MR look
25 more independent.

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1 Q All right. And then the last article in your binder
2 there, it's called "Characteristics and needs of people with
3 intellectual disability who have higher IQs" by Martha Snell
4 and Ruth Luckasson, in the binder 47. It's the Intellectual
5 Developmental Disabilities Journal, 2009?

6 A Yes.

7 Q Is this article related to the chapter that's in the
8 green book about people with higher IQs?

9 A Yes.

10 Q And what is the significance to this article in relation
11 to the issue we're talking about now?

12 A That people that have mild mental retardation can look
13 very, very much like people every day. If you don't have a
14 certain expertise and understanding of what environment can
15 make them -- can affect them, they can talk with you, they can
16 use e-mails, they can drive. Many of them can drive. They
17 can go places. They can take -- they can take directions to a
18 point. But particularly that's true when they have support
19 systems. But if they -- if those support systems are not
20 there, if they have to do something completely independently
21 without help, that's often when you see their greatest
22 problems.

23 Q And in the -- in the green book, do they have a chapter
24 that sets out the profile of people who have MR at the higher
25 IQ range?

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1 A Yes.

2 Q And the table, this Dr. Dr. Shapiro's slide, slide 93.

3 Are you familiar with this from the green book?

4 A Yes.

5 Q How does Mr. Wilson fit within this profile?

6 A Mr. Wilson has experienced low socioeconomic status and
7 that would be even true after leaving home. Obviously, you
8 have a low rate of employment and low career success.

9 It's more difficult to say in terms of poor
10 nutrition, because Mr. Wilson has always had -- has lived with
11 someone. So they've always been able to provide, although in
12 talking with the family, they discussed his inability to cook,
13 that he could not cook. That he could cook scrambled eggs and
14 he maybe could make a peanut butter sandwich, but they
15 described specific anecdotes of him not being able to put a
16 frozen steak in a George Foreman grill, for example, and the
17 George Foreman grill exploded, or attempting to cook a meal
18 with Monica and Monica cook, and not being able to complete
19 it. Or trying to cook gingerbread cookies with his
20 six-year-old niece and not being able to compete the -- not
21 being able to complete the cooking.

22 So in that sense poor nutrition would -- would be
23 relevant if he were independent. He's always been in a
24 situation where someone provided his food for him.

25 Q And that's an X factor. Right?

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1 A Most continue to live with parents or others. Mr. Wilson
2 never did live alone. He lived with other people. He lived
3 with his cousin. He lived with his mother. He lived with his
4 aunt. So that would be consistent of people with higher
5 scores that he continue to live with other people.

6 Q And by the way, you have seen the chart the government
7 put together on his incarceration status? This is exhibit, I
8 think it's 57.

9 A I don't know if --

10 Q Prison timeline?

11 A I don't know if I've seen that.

12 Q And this is from age ten onward?

13 MR. McGOVERN: Objection your Honor. The reason he
14 hasn't seen these charts is because this is all beyond the
15 scope of my cross. So I object to any further questioning.
16 This last question, I -- was never raised on cross-examination
17 and now to get further into this is even further far afield of
18 cross.

19 MR. BURT: I think he's suggested that his diagnosis
20 was incorrect on all prongs, is the crux I was getting from
21 the cross. Maybe I'm misinterpreting.

22 MR. McGOVERN: That was the correct thought, but
23 that -- the government did not --

24 THE COURT: You're sustained on that. Next
25 question.

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1 Q You were asked a question about wasn't it true that he
2 was placed in a program for emotionally disturbed kids. Do
3 you recall that?

4 A Yes.

5 Q And did you actually interview the person who was running
6 the program?

7 A Yes, Mr. Kulis.

8 Q Now, at the time he was placed in that emotionally
9 disturbed kid category, what were the options, where could he
10 have been placed?

11 A My understanding was that that was the -- it was either
12 that program or it would be Side Seven which was the program
13 that was actually geared for kids, in Mr. Kulis' words, had
14 conduct disorders.

15 So one -- it was one that had control over their
16 emotional behavior, and the other one did not have control
17 over their emotional behavior. And he was placed in the
18 program that did not have emotional control over the behavior.

19 Q So there was a conduct disorder category?

20 A It wasn't described as a conduct disorder. This was
21 really the differential that Mr. Kulis made, that the children
22 that were in the other program he saw them as true contact
23 disorders. He saw them as people that had the ability to
24 control their emotions but did not, as opposed to Mr. Wilson's
25 group who did not have the ability to control their emotions.

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1 MR. BURT: Thank you, that's all I have.

2 THE COURT: Okay. Anything else, Mr. McGovern?

3 MR. McGOVERN: Just a brief follow-up.

4 BY MR. McGOVERN

5 Q Doctor, you were asked about Dr. Frank's -- Dr. Frank
6 having observed intellectual deficits or something like that
7 to that effect?

8 A Yes.

9 Q And you said that at that time the defendant would not
10 have had any bias to have lied about or presented with
11 deficits that he didn't have at the time that he was
12 seeing Dr. Kulis?

13 A I think the specific question was for the death penalty.

14 Q Excuse me?

15 A I think the specific question was to the death penalty,
16 not just in general.

17 Q Oh, okay.

18 A And also -- I'm sorry, it was actually did Dr. Frank have
19 any bias.

20 Q Right. And you said that Dr. Frank didn't have --
21 apparently had no bias either way to make his observations?

22 A I couldn't determine that he would, yes.

23 Q But it's a full -- it fills out the picture here to
24 have -- do you recall that Dr. Frank estimated the defendant
25 as being borderline range?

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1 A Yes.

2 Q And that his diagnosis was that the defendant was
3 borderline intellectual functioning?

4 A I don't recall that language exactly. If you could show
5 it to me, I would appreciate it.

6 Q I'd be more than happy to. It's in evidence, it's
7 Government's 3981. I'll just show it to you to refresh your
8 recollection.

9 A Okay, thank you.

10 Yes.

11 Q So his diagnosis was that the defendant -- his diagnostic
12 impression was the defendant was in the borderline function
13 range. Right?

14 A Intellectual function, yes.

15 Q Intellectual function.

16 And you would agree that borderline intellectual
17 functioning is typically what is referred to as between 70 and
18 85 on IQ scale. Right?

19 A I don't recall --

20 MR. BURT: I'm going to object to that question
21 because the government's own exhibit indicates just the
22 opposite, the psychometric conversion chart.

23 MR. McGOVERN: I think he should answer the question
24 of what his understanding is, regardless of what exhibit --

25 THE COURT: Do you want to answer the question --

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1 THE WITNESS: Yes, your Honor.

2 THE COURT: -- the way defense counsel just answered
3 the question or the way you would answer the question?
4 Because I would rather have it the way you would answer the
5 question than having someone put words in your mouth.

6 A Well, my understanding is that a 70 certainly false --

7 THE COURT: If you do that again, I'm going to
8 sanction you. You want to have a side bar, you come to side
9 bar.

10 MR. BURT: Okay.

11 THE COURT: And I assure you will I sanction you.

12 A My understanding is that the range that you have provided
13 is much larger than would be just borderline, so that's a much
14 larger range, so it would not be what I would consider
15 borderline intellectual functioning.

16 Q Okay. And then you answered a question about the
17 defendant having a motivation to score lower on the Dr. Drob
18 IQ exam back in 2003. Do you remember that question?

19 A Yes.

20 Q You testified that it would have been extremely difficult
21 for the defendant to have contrived a 76 with Dr. Drob all by
22 his own actions. Right?

23 A Yes.

24 Q But it would be fair to say that if he was just trying to
25 depress his IQ score by not giving his best effort, he would

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1 have been able to do that if he wanted to. Right?

2 A Speculatively, that would be correct.

3 Q And speculatively, it would be -- it would be virtually
4 impossible to hit a 76 intentionally. Right?

5 A Well, it's not so much as hitting a 76 intentionally.

6 It's really that he -- a person that we acknowledge is
7 intellectually limited at best would be able to reproduce --
8 granted he had had it seven times -- to reproduce a score that
9 was completely within the confidence interval and the standard
10 error of measurement just because he was trying to manipulate.

11 Q Okay.

12 A That's the part that I think is --

13 Q Okay. So when you say you acknowledge that he already
14 has limited cognitive functioning, that's your acknowledgment.
15 Correct?

16 A No. I think even -- even if we look at all of his
17 scores, his scores reflect someone who is within the bottom 5
18 to 10 percent of intellectual functioning. If we were to take
19 all these scores and say that they were accurate, he has very
20 limited intellectual functioning.

21 Q He's not doing well on the scores. Do you agree with
22 that?

23 A He hasn't from a long -- from an early age.

24 Q Okay. But that doesn't make you mentally retarded, it
25 just makes you not having good scores if you're not actually

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1 mentally retarded. Right?

2 A But the question we were talking was him having his
3 cognitive ability to manipulate an IQ score and get the same
4 score he had gotten five or six or seven times -- or within
5 the same range that he had gotten a number of times.

6 Q And are you willing to agree that if there was some level
7 of malingering or not best effort being given by the defendant
8 during that 2003 examination, that would be something that
9 would be significant in evaluating the value of the 76.
10 Right?

11 A If there were objective evidence of him not giving his
12 best efforts, that would be something to take into
13 consideration.

14 MR. McGOVERN: Thank you. I have nothing.

15 THE COURT: Anything else?

16 MR. BURT: No, your Honor, thank you.

17 THE COURT: Okay, the witness is excused. You may
18 stand down, sir.

19 THE WITNESS: Thank you, your Honor.

20 THE COURT: Have a good evening.

21 THE WITNESS: Thank you.

22 MR. BURT: Your Honor, can I have one minute with
23 counsel? I believe we have a stipulation in the making.

24 THE COURT: Sure, that's fine.

25 MR. BURT: Thank you.

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1 Your Honor, I think we have a proposed stipulation.
2 We will reduce this to writing and file it with the court,
3 with the court's permission.

4 THE COURT: This is regarding?

5 MR. BURT: Your Honor, this is regarding Kathy
6 Yates, the neuropsychologist who is referenced in Dr. Drobs's
7 reports.

8 THE COURT: Mm-hmm.

9 MR. BURT: And the stipulation would be: If called
10 to testify Dr. Kathy Yates would testify that she authored the
11 reports contained in Defendant's Exhibit C-5, pages GOV4243
12 through 4241, and 4251 through 4261, and the two reports
13 marked as Government 96 and 101. And 101 will be marked
14 momentarily.

15 She would further testify that she never interviewed
16 Mr. Wilson for any reason and that she did not conduct a full
17 neuropsychological evaluation to assess intellectual
18 disability.

19 THE COURT: Is that agreed to by the government?

20 MR. McGOVERN: That's agreed to, Yes, Your Honor.

21 THE COURT: All right. So just let's reduce it to
22 writing so we can file it as an exhibit.

23 MR. BURT: Yes.

24 THE COURT: All right. You can give that to me
25 tomorrow.

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1 MR. McGOVERN: Your Honor, the government has an
2 application at this point.

3 THE COURT: You have an application? Yes, what's
4 your application?

5 MR. McGOVERN: We're moving to dismiss the Atkins
6 claim. Our view is that -- well --

7 THE COURT: Wait. Wait. Do you have any further
8 witnesses?

9 MR. BURT: No, your Honor.

10 THE COURT: You're going to rest?

11 MR. BURT: Correct.

12 THE COURT: Okay. Now you can have your
13 application.

14 MR. McGOVERN: Thank you, your Honor. Your Honor,
15 looking at the presentation of evidence in the light most
16 favorable to the defendant, the government submits that there
17 is no reasonable way that the fact finder could find by a
18 preponderance of the evidence that this defendant has met
19 these standards for mental retardation.

20 We've heard from at least five expert witnesses in
21 this case thus far. Dr. Shapiro had very little to say about
22 the IQ prong of the analysis. Dr. Olley focused his testimony
23 on the adaptive functioning, and then on cross-examination was
24 questioned about the IQ prong as well.

25 Dr. James appears to have been the only witness who

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1 was put forward by the defense to discuss the IQs in this case
2 and her testimony does not appear to have any statement in it
3 as to what IQ she relied on other than saying that she was
4 considering all of the IQs with varying degrees of merit.

5 We would point, your Honor, to the testimony of
6 Dr. Drob, or Dr. Drob, who we submit is the most credible
7 expert who testified in this case thus far. And Dr. Drob
8 testified that he's the person who actually administered the
9 IQ test in 2003, that the defendant, to some extent relies on.
10 And his testimony came into this record without any question
11 that he did not believe that the defendant was mentally
12 retarded, that adaptive functioning analysis was unnecessary,
13 that he wouldn't change anything in 2012 that he did in 2003.

14 To the extent that he identified cognitive deficits
15 in the defendant's presentation, he admitted on
16 cross-examination that some of that information appears to
17 have been faulty, that being the list learning data that he
18 relied on in the RBANS testing.

19 He, on cross-examination, when I showed him another
20 instance where the defendant fared very, very well or
21 performed very well on list learning, outside of a purely
22 clinical context, that the defendant performed very well
23 there, which Dr. Drob said meant one of two things: It meant
24 either the defendant was suffering from ADHD, which means that
25 it would allow him to perform better on some days better than

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1 others, or that he was malingering during the 2003 exam.

2 Those are the -- those were the only two options that Dr. Drob
3 provided us with.

4 So either he has ADHD or he was not using enough
5 effort. Neither of those would be suggestive of the findings
6 that Dr. Drob has to his cognitive deficits.

7 But in any event, Dr. Drob didn't say that he was
8 mentally retarded anyway. So the vast majority of this
9 evidence in this case has in no way advanced the claim that
10 the defendant can meet prong one of the -- of the mental
11 retardation evaluation requirement.

12 There are nine IQ scores. There's 1 IQ score from
13 1991 that comes in at a 71 or a 70, and the government has
14 demonstrated overwhelmingly that that's an untrustworthy IQ
15 score, and that that IQ score is the result of a test
16 defendant went into confrontationally, that the defendant
17 acted in a careless manner during the course of the
18 examination, that the defendant blurted out answers and had
19 his head on the desk during the examination.

20 That 1994 test, we submit -- yeah, 1994 test we
21 submit is not enough to -- is not enough to carry us over
22 the -- over the burden here, your Honor. That's the
23 government's argument. To satisfy prong one, they have to
24 prove that the defendant has an IQ in the range eligible for
25 mental retardation. They simply have not done that. Relying

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1 on this one IQ test is not reasonable under the -- under the
2 circumstances of this case.

3 And to the extent that the defense claims that this
4 '94 test is otherwise -- otherwise valid, the government has
5 pointed out that Dr. Nagler also prorated, just like the
6 criticisms they've had of the other IQ tests.

7 To go forward from this point, your Honor, and have
8 the government put on its witnesses so that Mister -- so that
9 the defense can cross-examine them for days on end, we submit
10 is not a good use of the court's resources. To have our
11 witnesses come forward and be cross-examined about the method
12 in which they tested the defendant's adaptive functioning is,
13 in our view, unnecessary.

14 The defense cannot make out prong one. There is --
15 the evidence, viewed in the best way possible for them, they
16 cannot make out that element of the mental retardation claim.

17 And for those reasons this process, we submit,
18 should be ended at this point, that their claim should be
19 dismissed and because there's -- while there are questions
20 that could be raised, and they're trying to raise them to the
21 best of their ability, there is no way that a reasonable fact
22 finder could say beyond a preponderance of the evidence that
23 they've proven that the defendant has an IQ within the range
24 of 70 to 75, or even approximately 75.

25 THE COURT: Mr. Burt.

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1 MR. BURT: Your Honor, looking at the three prongs,
2 I think the evidence on prongs two and three, especially the
3 documentary evidence is overwhelming. There's deficits in
4 these records, apart from the expert testimony that
5 established that from a very early age Mr. Wilson had deficits
6 in at least two of the ten areas of the DSM or one of the
7 three in the AAIDD. The documentary evidence is, of course,
8 bolstered by the expert testimony and the court has heard and
9 can evaluate.

10 I agree with the government that the real question
11 in the case is prong one. I don't think there's going to be
12 much serious days on end cross-examination about adaptive
13 deficits because I think the adaptive deficits are pretty well
14 established.

15 So if the concern here is lengthy cross-examination
16 that's going to exceed what the government did, I can assure
17 the court that the focus will be on the scores and on certain
18 aspects of the adaptive functioning. But I don't think that's
19 a reason to dismiss the claim at this point.

20 In terms of the scores, I think the court has
21 information in front of it from four highly competent experts
22 who have explained to the court why this pattern of scores
23 qualify their clinical judgment for consideration under prong
24 one. And they all indicated it is not a matter where the
25 court can look at a fixed cutoff score, it is a matter where

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1 the experts say there is a certain amount of clinical judgment
2 involved here.

3 Dr. James was very clear that her analysis was --
4 that the court considers all the scores but places primary
5 weight on ones where we have data. If the court looks at
6 those scores, the court will see scores that just -- even
7 without consideration of the confidence intervals, if you look
8 at Nagler, Drob and Denney and you consider practice effects
9 and the fact that Dr. Denney's score is nine years after the
10 time of the crime and you then factor in confidence intervals
11 and take into account what the experts said, that this is not
12 about a fixed score but about considering whether the score
13 falls within a confidence interval that includes the 75. I
14 think that we've more than sustained our burden on prong one.

15 So I'd ask the court to go forward based on that
16 analysis.

17 MR. McGOVERN: May I respond briefly, your Honor?

18 THE COURT: Briefly.

19 MR. McGOVERN: Briefly. The defense to this point
20 have conceded that Dr. Denney's IQ test is accurate. A couple
21 of different witnesses here have said that the 80 that
22 Dr. Denney got in testing the defendant was accurately -- that
23 the test was done properly and that the number was added
24 accurately.

25 The issue here, putting aside practice -- well, not

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1 putting aside. Engendering practice effects and all these
2 other things, that's speculation. They have not quantified
3 what the affects are of practice effects. They have -- those
4 are nice arguments but there's a burden of proof here. It has
5 to be more likely than not. This isn't whether or not there's
6 a question that maybe, maybe somehow, some way, somehow he's
7 in the range. He's just not. And that's the bottle line.

8 So the effects of practice effects, Dr. Olley
9 admitted that those, he -- he admitted so much more, but he
10 admitted that those types of things would be speculation, that
11 we don't know what the actual practice effects are causing, we
12 don't know what the band of confidence, what the real number
13 is. But what we -- what we do know is they have a burden of
14 proof and you can't overcome a burden of proof by pointing to
15 things that might have affected the scores.

16 The scores are the scores. The scores are clear.
17 The scores have -- have consistency over the years. They
18 are -- to the extent that there's an outlier, there's a very
19 fair, virtually uncontested explanation for why that outlier
20 exit exists. There's consistency. Does that -- if this were
21 the government's burden of proof to say that we proved that
22 he's not mentally retarded, well, sure, they can have all of
23 their arguments. But the problem for them is it's their
24 burden of proof.

25 And we respectfully submit that there is no way on a

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1 reading of this record that it can be found reasonably that
2 they have proved beyond a preponderance of the evidence, more
3 likely than not, that this defendant's IQ score is in the
4 appropriate range.

5 THE COURT: Now, I understand that the AAIDD does
6 not have a fixed cutoff score in determining where someone is
7 marginal as opposed to mildly mentally retarded.

8 But if we just take prong one, let's just take prong
9 one, which is what Mr. McGovern is talking about. In order to
10 meet your burden on prong one, the court has to make
11 a determination as to at what point the scores indicate mild
12 intellectual disability.

13 And do you have any enlightenment on that subject
14 for the court --

15 MR. BURT: Well, I --

16 THE COURT: -- since it's your burden.

17 MR. BURT: Sure. I can tell the court that there
18 are cases out there that say that as -- that it is properly a
19 matter of clinical judgment for the experts, and if the
20 experts say that in their clinical judgment prong one is met
21 and the court finds good reasons to credit those explanations,
22 that -- that the burden is satisfied even if there's not a
23 fixed IQ score that the experts are identifying.

24 And I think the numbers, if the Court just so said
25 the raw numbers before the Court, you've got a 71, which

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1 qualifies, and I'm looking at the Flynn adjusted numbers, so
2 part of our agreement, of course, depends on the court
3 accepting the arguments and recommendations of the AAIDD about
4 the Flynn effect.

5 We have Drob's score of 76, which slims down to a
6 73. And we have Dr. Denney's score, Flynn score of 78, with
7 experts testifying that -- and according to the government's
8 own cross-examination of Dr. James on the improvement in the
9 subtest scores after he was incarcerated, a factual basis that
10 he wasn't proving well in custody.

11 And if you consider the confidence intervals around
12 those scores, 71 -- or 70, 71 -- or 70, 73, and 78, those
13 scores fall clearly within the range of MR as defined by the
14 Supreme Court in Atkins. And so we think that the -- the
15 burden has been met.

16 The fact that Dr. Drob did not diagnose mental
17 retardation, I think the court can properly consider the fact
18 that he did not Flynn the scores and he never conducted the
19 type of adaptive behavior analysis which the experts in this
20 case have said should have been conducted in order to inform
21 his analysis of prong one. It's not just a matter of
22 establishing prong two, but also to see where that confidence
23 interval, his true score is.

24 THE COURT: Who are we talking about now?

25 MR. BURT: Dr. Drob's 76. As I understand the

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1 argument, is it said the court should place primary reliance
2 on the fact that Dr. Drob did not diagnose Mr. Wilson with MR.

3 We know, however, that he reached his conclusions in
4 2003. He did not have the records that we now have available
5 to assess that issue. And he never at any point in time did
6 an analysis of Flynn confidence intervals or adaptive
7 functioning. So there's explanation in front of the court as
8 to why he didn't reach any conclusion.

9 We know Dr. Yates didn't do an MR workup. And so
10 the weight that's being placed on Drob's failure to analyze I
11 don't think overcomes what is otherwise apparent, which is you
12 have three scores that qualify and you also have consistent
13 testimony that all of these scores are underestimates because
14 of the number of times that Mr. Wilson has been given these
15 particular instruments.

16 We know -- he says we haven't quantified the effect
17 of the practice effect. We have. There's testimony by
18 Dr. Shapiro. There's testimony by Dr. James that on the
19 performance IQs, the bump in scores is five to eight points.
20 And if the court takes five to eight points as the bump in
21 performance scores, these scores, all of them are
22 substantially brought down in the range of 75 or below.

23 THE COURT: All right. Well, I'm particularly
24 troubled that Dr. James conducted all sorts of tests but never
25 conducted an IQ test which could have bolstered the -- an

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1 argument about the effect that repeated testing has a -- tends
2 to enhance the scores.

3 But I do think that it's important for the court to
4 hear from the government's experts. It's important that in a
5 complicated discussion analysis like this, that I get briefing
6 from the parties, that we have a full record in the event that
7 the matter goes to the court of appeals one way or another, so
8 that everything will be presented to the court of appeals, if
9 necessary. And we've come this far and I think we have to go
10 the rest of the distance.

11 So I'm going to deny the motion without prejudice.
12 And we'll begin tomorrow morning with the government's
13 presentation, which brings me to the question of the schedule
14 that the government has in mind in terms of witnesses, timing,
15 and so forth.

16 MR. McGOVERN: Your Honor, apparently the government
17 intends to call Dr. Patterson as our next witness, but
18 Ms. Drezner, we're going to call Carla Drezner, the woman who
19 administered the 1991 IQ test. So if Ms. Drezner can get here
20 by 9:00 from Long Island, we would like to call her first.
21 But that would be -- we would -- if we can't call her first,
22 we'll call Dr. Patterson first.

23 THE COURT: How long will your direct of
24 Dr. Patterson last?

25 MR. McGOVERN: Probably like half an hour.

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1 THE COURT: Okay. And --

2 MR. BURT: Two hours, probably.

3 THE COURT: All right. Well, if -- if --

4 MR. BURT: Maximum, maybe less.

5 THE COURT: All right. If Ms. Drezner arrives by

6 9:00, then we'll take her first, that's all.

7 MR. McGOVERN: Okay, great.

8 THE COURT: And -- but, and how long will her direct
9 take?

10 MR. McGOVERN: Her direct should be about half an
11 hour, 45 minutes.

12 MR. BURT: Twenty-five minutes, probably.

13 THE COURT: And that brings us to the third person
14 on the list.

15 MR. McGOVERN: Then there's Dr. Denney.

16 THE COURT: And that will take on direct?

17 MR. McGOVERN: On direct --

18 THE COURT: If you follow my instructions.

19 MR. McGOVERN: I'm trying to follow your
20 instructions.

21 THE COURT: Well, that would be appreciated.

22 MR. McGOVERN: So with Dr. Denney probably a little
23 bit more that I have to do on direct with him, but still in
24 the neighborhood of 45 minutes to an hour.

25 THE COURT: And instructions that I've given, just

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1 to recap it, is that the -- is that you're not to go into the
2 specifics of the reports which the court already has and the
3 direct only encompass matters that have arisen in terms of
4 questions in court and other more recent issues since the
5 reports were submitted.

6 MR. McGOVERN: Okay. With Dr. Patterson we were
7 hoping to give the court a little bit more of a sense of the
8 hour and a half meeting that he had with the defendant.

9 THE COURT: Well, that's all right, you can do that.
10 Everyone seems to be doing it. I don't see how I can stop you
11 from doing it in that case. So we should have all of two
12 witnesses and part of a third tomorrow?

13 MR. McGOVERN: Yup.

14 THE COURT: And then the following day?

15 MR. McGOVERN: Dr. Mapou is our expert in the area
16 of learning disabilities.

17 THE COURT: Uh-huh.

18 MR. McGOVERN: And then we have one more witness
19 that we're still contemplating whether it's necessary to call,
20 who would be somebody from the MDC, who is an inmate and
21 we're -- you know, there are security concerns, so we'll --
22 we'll present -- I've given a thumbnail of the testimony to
23 Mr. Burt without giving him the name and -- but I -- I'm --
24 we're really struggling with the idea of even bothering
25 calling him given the nature of the testimony.

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1 THE COURT: So we could complete all the testimony
2 this week, is what you're telling me?

3 MR. McGOVERN: Oh, yeah.

4 MS COHEN: Yes.

5 THE COURT: Before Saturday?

6 MR. McGOVERN: Yes.

7 MS. CO: Yes.

8 MR. BURT: Your Honor --

9 THE COURT: And will you have a rebuttal case?

10 MR. BURT: Your Honor, there would be at most two
11 rebuttal witnesses to Dr. Denney's testimony who would be
12 civilian witnesses. And I don't anticipate it would take
13 longer than probably a couple of hours.

14 THE COURT: Okay. All right, which means that we
15 might get through everything by Friday.

16 MR. McGOVERN: That's right.

17 THE COURT: All right. And then -- and then we're
18 not going to have closing arguments, we're just going to have
19 briefs and we have a schedule for that already. Right?

20 MR. BURT: I believe we set a schedule.

21 THE COURT: I think we set a schedule.

22 MR. BURT: I can't remember what it is.

23 THE COURT: I'll try to remember.

24 MR. BURT: Your Honor, in regard to this inmate
25 witness, I've been informed by Mr. McGovern that there is

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1 going to be some substantial impeachment material. Could the
2 court set some sort of deadline for when we get at that so we
3 can be prepared to deal with this gentleman and not have any
4 delays there? I don't know what's going to be delivered but
5 I've been told it's going to be substantial.

6 MR. McGOVERN: It's not that substantial but we will
7 give it to him tomorrow morning if we decide to call this
8 witness.

9 MR. BURT: Thank you.

10 THE COURT: Okay. Anything further for this
11 evening?

12 MR. McGOVERN: No, your Honor.

13 THE COURT: All right, we'll see you at 9:00
14 tomorrow morning. Thank you.

15 (Whereupon, proceedings were adjourned to December
16 4, 2012 at 9:00 a.m.)
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<p>W witnesses... 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